TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 686 221.

S. D. HATFIELD AND NANCY C. RUTHERFORD, APPELLANTS,

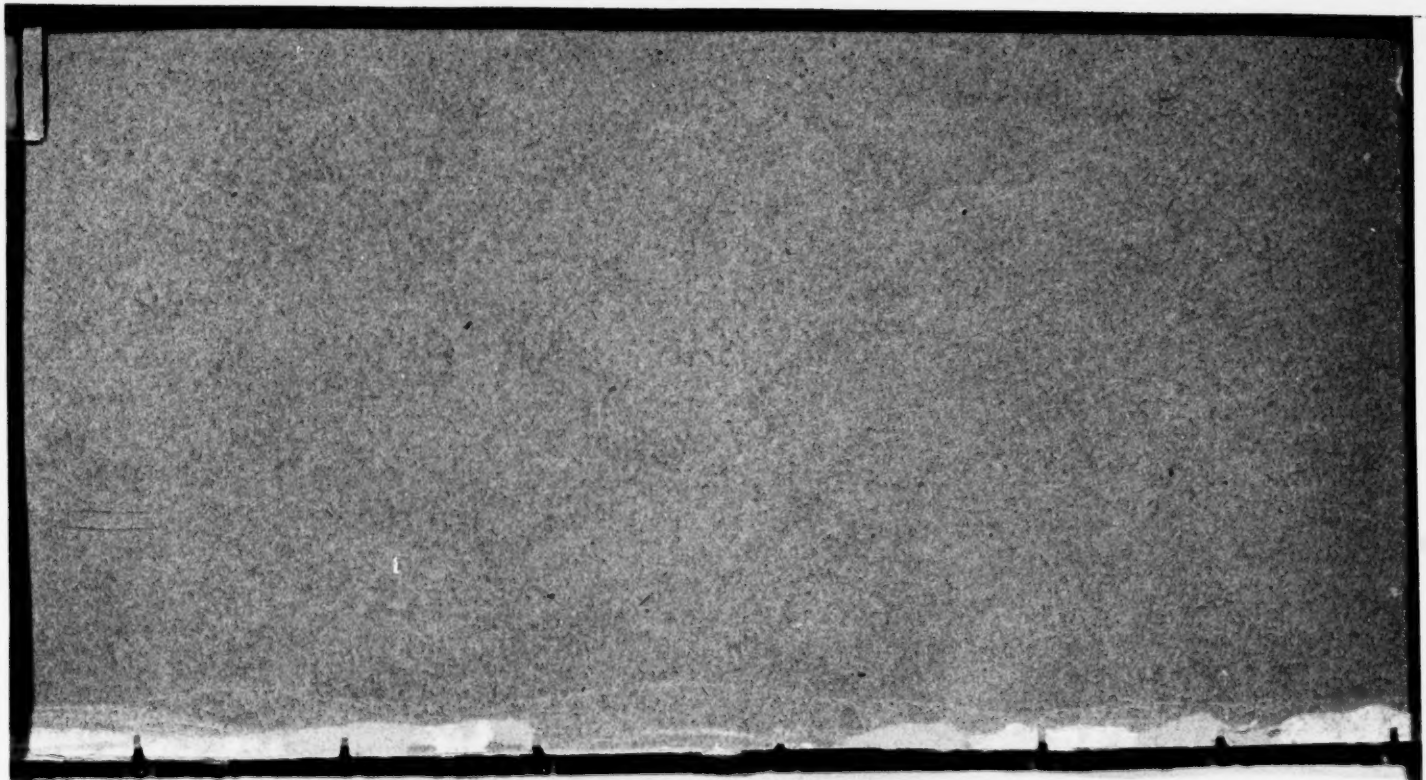
vs.

HENRY C. KING.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

FILED JANUARY 2, 1901.

(18,011.)



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1 Be it remembered that heretofore, to wit, on the 8th day of October, 1898, came Henry C. King, by his counsel, and filed his bill of complaint against S. D. Hatfield and Nancy C. Rutherford; which said bill of complaint is in the words and figures following, to wit:

In the Circuit Court of the United States for the District of West Virginia.

To the honorable judges of said court:

Henry C. King, of the city of New York, a citizen and resident of the State of New York, brings this his bill against S. D. Hatfield and Nancy C. Rutherford, citizens and residents of the State of West Virginia; and thereupon your orator complains and says:

That this is a suit of a civil nature in equity arising under the Constitution of the United States and in which there is a controversy between citizens of different States and in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of five thousand dollars and in which it is claimed that the Constitution and laws of a State, to wit, the State of West Virginia, contravene the Constitution of the United States.

That your orator is the owner in fee and is in the actual possession of a certain tract of land situate partly in said district, in the counties of Wyoming, Logan, Mingo, and McDowell, and partly in the States of Kentucky and Virginia, which tract of land, commonly known as the "Robert Morris 500,000-acre grant," was granted to the Honorable Robert Morris, of Philadelphia, by the Commonwealth of Virginia by letters patent dated June 23rd, 1795, being described therein as follows, viz: "A certain tract or parcel of land containing 500,000 acres by survey bearing date the 28th day of October, 1794, lying and being in the counties of Wythe and Russell, the greater part thereof in the former, on Sandy and Gyandotte rivers and the waters thereof, and is bounded as followeth, to wit:

(Further description omitted by direction and agreement of parties.—Clerk.)

2 That your orator derives title to said land as follows: Said Robert Morris granted and conveyed said land so patented to him as aforesaid by deed dated November 16th, 1796, or by a deed therein mentioned, to James Swan, who afterwards, and prior to the year 1838, departed this life in Paris, France, insolvent and heavily indebted to numerous persons, chiefly French army officers who had served with him in the war for American independence. The said tract of land, together with other tracts belonging to said Swan having become forfeited to the Commonwealth of Virginia, or to the literary fund thereof, for non-payment of taxes thereon, and the title thereto being vested in said Commonwealth, or said literary fund, the General Assembly of said Commonwealth, by an act passed and adopted March 15th, 1838, entitled "An act to amend an act entitled

'An act to amend and explain the law concerning western land titles and for other purposes,'" which is made a part of this bill, released said land from all arrears of taxes and vested the title to said land in John Peter Dumas, as trustee, for the benefit of the creditors of said Swan, with full power to sell and convey same.

On or about the 2nd day of December, A. D. 1847, said Dumas died seized of said land as such trustee, and by an order of the circuit court of Virginia, for the county of Kanawha (now in West Virginia) in which county a part of said "Swan estate" was situate, made and entered on the 1st day of June, A. D. 1855, in the chancery cause then pending in said court, entitled "Dumas *et als. vs.* D'Hue De Monsignon *et als.*" Josiah Randall, of Philadelphia, Pennsylvania, was appointed trustee in place and stead of, and invested with all the estate and power of, said Dumas, trustee, and the said Josiah Randall having died on or about 10th day of September, A. D. 1866, seized of said land, as such trustee, Robert E. Randall, of said Philadelphia, was duly appointed his successor in said trust by order duly entered in the last-named court and cause on the 3rd day of October, A. D. 1866, and by an order duly entered on the 20th day of May, 1867, in the circuit court of Virginia for the county of Wythe, wherein part of said Swan estate was situate, in the chancery suit therein pending entitled "Randall's Executors *vs.* Puget *et als.*"

On the 29th day of June, 1886, the said Robert E. Randall resigned his said trust and John R. Read, of said Philadelphia, was duly appointed in the place and stead of said Randall, by order that day duly entered in this court — consolidated causes therein pending, by removal, entitled "Dumas *et als. vs.* De Monsignon *et als.*," "La Couture *vs.* Randall *et als.*," and "Randall *vs.* Dressler *et als.*;" by order entered on the 29th day of June, A. D. 1891, in the last-mentioned causes also pending in the said circuit court of West Virginia for the county of Kanawha; and by order duly entered on the 7th day of March, A. D. 1890, in said circuit court for Wythe county, Virginia, in said suit of "Randall's Executors *vs.* Puget *et als.*," by virtue of which appointment said Read became vested with all the estate, power and authority formerly bestowed upon and vested in said Dumas, trustee, by the act aforesaid.

By virtue of his authority as such trustee and the further authority of a decree entered on the 29th day of August, A. D. 1891, in said causes in this court, and of a decree entered on the 10th day of September, A. D. 1891, in said causes in said circuit court of Kanawha county, the said John R. Read, trustee, together with David W.

3 Armstrong, who held a contract with said trustee for the purchase of said land, conveyed said land by deed dated September 29th, 1891, to John V. Le Noyne, and the said Le Noyne and his wife, by deed dated December 27th, 1893, conveyed the same to your orator, who now owns the same; all which will more fully appear by reference to copies of said grant, orders, decrees and deed duly of record, copies whereof your orator will in due time file as part hereof marked "H. C. K. 1" to "H. C. K. 11" respectively. Said deed from Reed and Armstrong to Le Noyne, as also said grant to

Morris, makes reservation of certain lands, but the same are *and* not within that part of said tract concerned in this bill.

The said John Peter Dumas, trustee as aforesaid of the said estate of James Swan, in his lifetime executed to one John Joseph Marie Schmidt Thornfeld certain deeds and contracts for portion or all of said Swan estate, which consisted of numerous large tracts of land, among them being a contract or conveyance of 300,000 acres to be selected by said Thornfeld out of said 500,000-acre tract, and another contract or conveyance for the whole of said estate, and the rights or interests thereby acquired by said Thornfeld afterwards became vested in or were claimed by Louis Antoine des Vergas de Maupertuis (sometimes spelled Mauperture) and August Marie Fermin Noverre de Serecourt, and afterwards were claimed by De Maupertuis and the whole estate by Emile Dumas.

In a chancery suit instituted in the circuit court of Virginia for the county of Logan, now West Virginia, wherein the greater part of said 500,000-acre tract lay, wherein one Claud Bernard was complainant and said Thornfeld, De Serecourt, De Maupertuis, Emile Dumas, and others were defendants, a decree was made and entered on the 2nd day of March, 1855, whereby it was directed that so much of said 500,000-acre tract as should be necessary would be sold for the payment of certain moneys therein stated, and one James M. Laidley was by said decree appointed a special commissioner for the purpose of making said sale and conveyance thereunder. The records of said court, including the record of said suit, have long since been destroyed, but the proceedings therein are referred
4 to in the deed made pursuant to the sale had under said decree

Pursuant to said decree an undivided three-fourths of said 500,000 acres were sold and conveyed by said commissioner to Anthony Lawson on the 10th day of May, 1856, and said deed was duly recorded in the office of the clerk of the county court of said Logan county, at the February, 1857, term thereof, and now appears upon said record, a copy whereof will be filed herein and made part hereof and marked "H. C. K. No. 12."

By deed dated July 26th, 1876, said Lawson and his wife conveyed the land to James L. Black and Abraham Suydam. Suydam and wife, by deed dated August 9th, 1876, conveyed their interest therein to said Black; Black by deed dated October 9th, 1876, conveyed said undivided three-fourth- of said 500,000 acres to William Reed, who conveyed the same by deed dated October 8th, 1878, to the Pittsburgh National Bank of Commerce. The said bank by deed of June 23rd, 1893, conveyed the same to said David Armstrong, who conveyed the same by deed dated Aug. 5th, 1893, to complainant King. All said deeds, duly and properly executed and acknowledged, were duly and promptly recorded in said Logan and other counties where said land was situate, and copies of the same, marked "H. C. K. No. 13 to No. 18" respectively, will be filed herein as part of this bill.

By a decree made and entered in the circuit court of Virginia for the county of Kanawha (now West Virginia), January 21st, 1859, in

the consolidated suits of Dumas *vs.* De Monsignon *et als.*, Randall, trustee, *vs.* Dressler *et als.*, and La Couture *vs.* Randall, trustee, *et als.*, it was, among other things, adjudged that said De Maupertuis was the owner of 300,000 acres of said 500,000-acre grant, subject to a mortgage or lien thereon for 227,000 franks in favor of said Swan estate, and that Randall, trustee, was the owner of said mortgage and of 200,000 acres of said land. Maupertuis' portion was ordered to be sold to satisfy said mortgage, but no sale thereof was made until the sale to Armstrong, by order of this honorable court in 1891, as aforesaid, in said suits, which had been removed thereto.

5 The said Anthony Lawson was not a party to any of the last-mentioned suits, which were all subsequent to the decree under which he claimed title.

The said trustee of said Swan estate did not recognize the claim of title of said Lawson and his grantees and continued to claim title to the whole of said tract, while said Lawson and his successors claimed the undivided three-fourths thereof; but whatever be the merit or want of it in the claim of either party, the whole title has been reunited in this complainant, and he is the owner thereof and of all the estate, right, title, and interest granted by the said Commonwealth of Virginia to said Robert Morris and by every right, title, or interest ever claimed by any one through or under the said Morris, and all the grants, orders, decrees, deeds, and other evidences and muniments of complainant's or his predecessor's title have been duly and promptly and properly recorded in the proper offices and courts, open at all times to inspection and examination.

That said land, from the 15th day of March, 1838, until the sale of the same to complainant's grantor, Le Moyne, in 1891, was a trust estate in the hands of a trustee appointed by the legislature of the State and by the courts of the State and by this court, and was during all that period in the custody of the law and the courts, and said trust was for nearly twenty years immediately prior to said sale, which was ordered and approved by this court, under the constant control and management of this honorable court, and when complainant purchased said land he went into the immediate, actual possession and use of the same by his servants and agents, and has remained up to the present time in possession of the same, except so far as portions of same, are occupied adversely to him by other persons against whom he has brought actions of ejectment.

That there are not exceeding 300,000 acres of said entire tract lying in said State of West Virginia, but the said Anthony

6 Lawson caused the interest claimed by him to be entered upon the land books of Logan county and charged with taxes from the year 1865 to and including the year 1876 as 375,000 acres, and his grantees, Black and Suydam, did the like until the year 1878, when the said interest was by order of the county court of said county reduced in acreage to 100,000 acres, at which amount taxes were charged to and paid by the said Black, Suydam, Reed, and the Pittsburgh National Bank of Commerce up to and including the year 1882; and notwithstanding such charging and collection of taxes by said State in Logan county, the said Randall and the heirs-

at-law of said Maupertuis, then deceased, in the year 1869, being unacquainted with the location of said tract, entered the whole 500,000 acres upon the land books of Wyoming county and caused said Randall's interest to be charged with taxes on 200,000 acres and the said Maupertuis interest on 300,000 acres, and in 1871 the said 200,000 acres were sold to the State for the tax of 1870, and in 1877 said 300,000 acres were sold to the State for the taxes of 1874–1875, which sales were invalid, as your orator is advised.

That afterwards a proceeding was instituted in the circuit court of said State for Wyoming county on behalf of said State to sell said 500,000-acre tract of land, and said Robert E. Randall, trustee, filed his petition therein, praying leave to pay any taxes that might be due upon said land and to redeem the same, and said Pittsburgh National Bank of Commerce filed its petition, contesting the title of said Randall, and in said suit such proceedings were had that on the 10th day of April, 1883, a decree was made, wherein it was adjudged that the said Randall, as trustee of said Swan estate and as a creditor of said Maupertuis, had title superior to all other to said land and the right to redeem the whole of said 500,000-acre tract, and that the sum of $8,000.00, that day paid into open court, was the total amount of all taxes, costs, charges, and damages due upon said land up to and including the year 1883, and decreeing that
7 said payment operate as a release and exoneration of said taxes on said land, and that no sale thereof be made, and none was made (*vide* 29 W. Va., 633), a copy of which decree, marked "Wyoming, 1883," is herewith exhibited.

That by said decree last mentioned it was ordered that the clerk of said court certify a copy thereof to the auditor of West Virginia, and it was further the duty of said clerk, under the provision of the statute of said State then in force, to certify to the clerk of the county court of each of the counties in which said land was situate an abstract of said decree, in order that said land might, by the said clerk of the county court, whose duty it was, be entered upon the land books and charged with taxes; and it was also the duty of the auditor, for the same purpose, to notify said clerk of the redemption of said land; but your orator is informed that nevertheless said land was not charged with State taxes upon the land books of either of the counties of West Virginia in which the same is situate, in the name of any of the claimants thereof, for five successive years after said year 1883.

That on or about the 7th of May, 1894, the State of West Virginia, upon the report of the commissioner of school lands of Wyoming county and by order of the circuit court of West Virginia for said county, instituted its suit in chancery against your orator and the said Randall and the Pittsburgh National Bank of Commerce and other persons from whom your orator derives title, for the purpose of subjecting to sale, for the benefit of the school fund of West Virginia, so much of said 500,000-acre grant as was then vested in the State of West Virginia by alleged forfeiture of said grant for non-assessment thereof for five successive years after 1883, and your orator filed in said cause his answer to said suit, denying that said

land was forfeited for any cause or that any part thereof was subject to sale in said suit or otherwise, but tendering and offering to pay any taxes, if any, that might be chargeable thereon; and afterwards such proceedings were had in said suit that on the 30th day
8 of September, 1897, your orator having paid to the commissioner of school lands of said county the amount of taxes, interest, and costs adjudged by the court in said cause to be chargeable upon said land, a decree was duly made and entered discharging and releasing said land from all taxes and forfeiture to said State up to and including the year 1897, and your orator became thereby reinvested with all title, if any, that had been forfeited to said State and was subject to redemption. A copy of said decree, marked "Wyoming, 1897," is herewith exhibited.

That one Aly Hatfield, contriving and devising how he might secure an apparent title to parcels of the said tract of land now owned by your orator, falsely and fraudulently representing to the officers of the Commonwealth of Virginia who were charged with the duty of issuing grants of the waste and unappropriated land of said Commonwealth that the land desired by him was such waste and unappropriated land, on the 1st day of February, 1859, procured from said officers three documents, purporting to be grants for tracts containing respectively 330, 72, and 450 acres of land on Ben creek, then in said Logan county, but now in said Mingo county, which documents are of record in the office of the auditor of West Virginia, in Grant Book 1, pages 460, 462, 463, respectively; and afterwards, in like manner, the said Aly, on the 1st day of July, 1861, procured two other like pretended grants for tracts of 470 and 390 acres, respectively, on said Ben creek, which pretended grants are of record in said auditor's office, in Grant Book 2, pages 525, 526, respectively, copies of which, marked "Hatfield No. 1" and "Hatfield No. 2," will be filed herewith.

That at the time said pretended grants were issued the land therein described was wholly part and parcel of said Morris grant, and was owned by your orator's said predecessor in title, and was not waste and unappropriated land or otherwise belonging to said Commonwealth, nor within the power of said Commonwealth or of any
9 officers thereof to *to* grant or dispose of, as said Aly well knew, and said instruments were and are wholly null and void, but, being in due form, they purport and appear upon their faces to convey title to the land therein described and can be shown to be invalid only by evidence *aliunde*.

That afterwards the said Aly died intestate without having disposed of his pretended title or claim to said 330 and 450 acre tracts, leaving surviving him — his only heir-at-law one Joseph Hatfield, who thereafter laid claim to said two tracts.

That the said Joseph Hatfield, for the purpose of securing further apparent title to parcel of said Morris grant, then owned by your orator's predecessor in title, as aforesaid, fraudulently conspiring to that end with the then commissioner of school lands of said Logan county, wrongfully and fraudulently procured said commissioner of school lands falsely to report to the circuit court of West Vir-

ginia for said Logan county, at the July, 1883, term thereof, that a certain parcel of land on said Ben creek in said county, mentioned as 140 acres, was waste and unappropriated land of said State and subject to sale as such for the benefit of the school fund of said State and to procure an order of said court for the sale thereof, at which sale, made October 2nd, 1883, under said order, the said Hatfield became the pretended purchaser of said land at about the costs of proceedings for such sale, and on or about the 14th day of March, 1889, procured said commissioner of school lands to execute to him an instrument of writing purporting to convey to said Joseph Hatfield the said 140 acres of land, which instrument the said Joseph procured to be recorded on the 12th day of August, 1889, in the deed records of said county, in the office of the clerk of the county court, in Book "N," at page 639.

That for the like purpose and by like conspiracy with said commissioner of school lands the said Joseph Hatfield procured said commissioner, at the April, 1887, term of said Logan circuit
10 court, to report a certain other tract of 48 acres as waste and unappropriated land and to procure an order for sale thereof and to sell the same to said Joseph Hatfield at the July, 1888, term of said court and to execute to said Joseph on the 24th day of August, 1888, a pretended deed therefor, which the said Joseph caused to be recorded in said county clerk's office on the 31st day of August, 1888, in Deed Book "K," at page 409.

That prior to the last-mentioned transaction said Joseph Hatfield presented to said Logan circuit court a petition stating that he had purchased from the commissioner of school lands of said county a tract of 72 acres of land on said Ben creek, and praying that said commissioner be authorized to execute to said Joseph a deed therefor, which was accordingly done and said deed executed on the 10th day of November, 1884, and the said Joseph caused the same to be recorded in the said deed records, in Book "I," at page 464. Copies of said deed, marked "Hatfield No. 3, No. 4, and No. 5," respectively, will be filed herewith.

That all the proceedings by said commissioner of school lands were purely *ex parte* and non-judicial and without notice to your orator's predecessor in title, the then owner of said Morris grant, and at the time said tracts of land were reported and sold and said deed executed by said commissioner of school lands the said lands were not waste and unappropriated nor forfeited nor for any other cause subject to sale in any manner or for any purpose whatever by said commissioner of school lands nor by or on behalf of the State of West Virginia, as both said commissioner and said Hatfield well knew, and said proceedings were wholly without authority of law and were *coram non judice* and void and gave to said commissioner no
11 right or authority to make sale of said land or to execute said deeds therefor, and the same are fraudulent, null, and void, but said deeds and proceedings, being in form of law and being regular upon their faces, appear to convey title to the land therein described, and the invalidity of said deed can only be made to appear by evidence *aliunde*.

That after the procuring of said fraudulent and pretended deeds, as aforesaid, to wit, about the year 1891, the said Joseph Hatfield died intestate, leaving as his only heirs-at-law the defendants above named, who thereupon set up claim of title to the land embraced in said pretended grants and deeds and now wrongfully claim title thereto, and such claims and the said pretended grants and deeds cast a cloud upon your orator's title to his said land and hinder and embarrass him in the free use, enjoyment, and disposal thereof.

That the existing constitution of West Virginia, adopted in the year 1872, provides that it shall be the duty of every owner or claimant of land to have it entered on the land books of the county in which it or a part of it is situated and to cause himself to be charged with the taxes thereon and pay the same, and further provides that when for any five successive years after the year 1869 the owner of any tract of land containing one thousand acres or more shall not have been charged on such land books with State tax on said land, then, by operation of such provision, the land shall be forfeited and the title thereto vest in the said State, but neither said constitution nor any statute of said State before or since the adoption of said constitution has made any provision or given any direction whereby or how the said duty may be discharged by such land-owner; but, on the contrary, the legislature of said State, by laws enacted before said constitution was adopted and subsequently re-enacted, has made complete provision for the entering and charging of all lands subject to taxation by the public officers, without reference to and in spite of the
12 owner thereof, and has provided that when lands have been sold to the State for unpaid taxes they shall not be again entered upon the land books unless and until the said lands are redeemed, when it is by law distinctly the duty of the public officers of the State to enter and charge such lands independently of any action by the owner thereof, and your orator is advised that said provision of said constitution requiring the land-owner to have his land entered for taxation has never been made operative, and your orator is further advised that it was not the purpose of said provision to apply to, and that it could not apply to, any land that at the time said constitution was adopted was already on or had been entered upon the land books, for the then existing statutes provided for the regular charging of land by the county officers, year by year, when once the said land was entered on the land books or brought to their notice, and your orator's said land had been entered upon the said land books long before the adoption of said constitution, to wit, in the year 1869, and was on said land books charged with taxes in the names of your orator's predecessors in title when and after said constitution of 1872 was adopted, and said land was not within the purview of said provision, as your orator is advised, whether the same was operative or not.

That after the sale of said land for taxes, as aforesaid, it could not lawfully be entered upon the land books and charged with taxes until after the redemption thereof, and the said redemption decree of 1883, procured by said Randall, trustee, your orator's predecessor in title, contained and made all the provision for the restoration of

said land to the land books that was necessary to cause the said land to be charged with taxes, if the officers of said State had discharged their duty under the law and under said decree, and the said Randall did all that could reasonably have been required of him, or that, in the absence of specific statutory direction, he could
13 have supposed needful for him to do to cause said land to be charged with taxes, if any duty was incumbent upon him in the matter; but, as aforesaid, said land was not entered upon the land books nor charged with State taxes by the officers who alone had the power and authority to enter and charge said land.

That said constitution, section 3, article 13, further provides that the title to lands forfeited to said State for non-assessment of taxes, as aforesaid, "shall be and is" by said constitution transferred to and vested in any person (among others mentioned) for so much of said land as such person shall have title or claim to, regularly derived mediately or immediately from or under a grant of the Commonwealth of Virginia or of the State of West Virginia, not forfeited, which but for the title forfeited would be valid, and who or those under whom he claims has or shall have paid all State taxes charged or chargeable thereon for five successive years after the year 1865 or from the date of the grant, if it shall have issued since that year; and the defendants claim that the title of your orator's predecessor in estate to said Morris grant was forfeited in the year 1888 by reason of said non-assessment of taxes thereon after 1883, and by operation of said constitution that the said pretended grants of 330 and 450 acres of land, upon which they or the said Joseph Hatfield have paid all State taxes since the year 1865, could, but for said Morris grant, be valid, and that by operation and virtue of the provision last mentioned of said constitution the title vested, by such forfeiture, in defendants to the extent of the said grants claimed by them. But your orator is advised and claims that the said provisions of said constitution purporting by its own operation, irredeemably and without judicial proceedings, to forfeit lands for non-assessment of State taxes for five successive years and to vest such forfeited title in strangers
14 thereto are in contravention of the Constitution of the United States, and are therefore null and void, and that your orator's land never was forfeited thereby, and the title thereto could not and did not vest in defendants to any extent or in any manner, and that whether said provision be void or for any reason valid it is not the true meaning and intention of said constitution to vest in other persons title to any land, forfeited or otherwise, to which the title was not in the State at the time of the adoption of said constitution, and, so far as said constitution purports or attempts, if it does, to transfer to or to vest in any person other than the former owner the title to any land thereafter to become forfeited for non-assessment, your orator is advised and claims that said constitution is in contravention of the Constitution of the United States and is null and void.

That your orator is advised that it may be urged that it has recently been held by the Supreme Court of the United States in the

case of King *vs.* Mullins that the forfeiture of land by the constitution of the State of West Virginia is valid, and that such decision is binding and conclusive upon your orator and upon this court; but your orator is advised and asserts that said Supreme Court held such forfeiture to be valid only by virtue of the statutes of said State and the suits and judicial proceedings by the State thereunder, wherein and whereby the person whose lands are forfeited may redeem the same by payment of the taxes that should have been charged thereon and because of such right of redemption; and your orator shows that by the terms of those statutes no right is given, and no proceeding is afforded, whereby there can be any redemption of lands alleged to be forfeited that are claimed adversely under the provision of section 3 of article 13 of said State constitution; but all such portions are by express terms of said statute reversed and excluded from the operation and effect of such redemption and of the
15 proceedings wherein redemption as to land not so claimed is permitted; and the defendants contend the said tracts claimed by them under said so-called grants from the Commonwealth are not subject to nor affected by the said statutes and proceedings which were relied upon by said Supreme Court to sustain said forfeiture, and said decision has no application to any of the questions arising herein concerning said land claimed by defendants, as aforesaid, and your orator claims that said statutes contravene the Constitution of the United States and of said State.

That your orator is advised that it may be objected or suggested that your orator is negligent in bringing this bill, and that he ought not, therefore, to have the aid of a court of equity in this behalf, concerning which objection your orator shows that not only ought such objection not to be entertained in this court, in which up to a short time before your orator's purchase of said land the same had been held and managed as a trust estate, but at the time of your orator's said purchase he had no knowledge or notice of such adverse claims by the defendants or of the said pretended grants and deeds, but upon discovering the said claims to said tracts and other lands of your orator, some time after his said purchase, your orator brought suit against said defendants and others, and in order to the determination of the legal controversies between your orator and these defendants, especially the question of forfeiture, there being no dispute of fact, an agreed case was by the parties hereto submitted to and received by this court, upon briefs, by its order, at its June, 1895, term, the Honorable John J. Jackson, district judge, presiding, but by the reason of the illness of the said judge no decision of said cause was rendered before the said cause of King *vs.* Mullins came on for trial in this court, and no decision of said submitted cause has ever been rendered therein.

That your orator is without any plain, speedy, and adequate remedy at common law, because, your orator being in possession of
16 his said grant and the defendants not being in possession of the said lands claimed by them under said fraudulent instruments, your orator is advised that no action at law will lie against them; wherefore your orator, being elsewhere remediless, comes into

your honor's court of chancery, where alone such matters are cognizable and relievable, and prays:

That this bill be received and filed, and that your orator have proper process thereon against said Hatfield and Rutherford.

That said pretended grants to said Aly Hatfield for said 330 and 450 acre tracts and said pretended deeds from the commissioner of school lands to Joseph Hatfield, under which the defendants claim, and each and every of them and the record thereof, and as well the pretended decrees of said circuit court for the said county of Logan purporting to authorize a sale and conveyance of said lands by said commissioner, be adjudged and decreed and held to be invalid, null, and void and of no effect, and that the same be cancelled, annulled, and set aside.

That the defendants and each of them be adjudged and decreed to have no right, title, interest, estate, or valid claim by reason of said pretended grants, decrees, and deeds to the lands and premises therein described or mentioned; that their and each of their said claims and pretensions to said lands be adjudged and decreed to be groundless; that your orator's title be quieted against them, and that the defendants and each of them be perpetually enjoined and restrained from asserting any title or claim to said lands under said pretended grants, decrees, and deeds and from disputing or questioning your orator's title to said lands.

That your orator have all further and fuller and more general relief proper in the premises.

And your orator will ever pray, etc.

HENRY C. KING,
By Counsel.

MAYNARD F. STILES,
E. L. BUTTRICK,
Solicitors.

17 EXHIBIT "H. C. K. No. 1."

Robert Brooke, Esq., governor of the Commonwealth of Virginia, to all — whom these presents shall come, Greeting:

Know ye, by virtue of 11 land office treasury warrants Nos. 652, 653, 654, 655, 658, 659, 643, 645, 647, 648, and issued the 28th Aug't, 1894, & No. 619, issued 18th September, 1794, there is granted by the said Commonwealth, unto Robert Morris, assignee of Wilson Cary Nicholas, a certain tract or parcel of land containing 500,000 acres by survey bearing date the 28th day of October, 1794, lying and being in the counties of Wythe and Russell, the greater part thereof in the former, on Sandy and Guyandotte rivers and the waters thereof and is bounded as followeth, to wit:

Beginning at 2 poplars and 2 chestnut trees on a branch of Guyandotte river and about 6 miles from the mouth of Little War creek, a branch of Sandy river being a corner of a survey of said Nicholas of 480,000 acres and a survey of 320,000 acres made for said Nicholas and Jacob Kenney and with a line of the latter S. 33° W. 6,720 poles

crossing a dividing ridge and down War creek to the mouth crossing Sandy river at 6 miles, crossing Panther creek at 9 miles and crossing several ridges to 4 white oaks on the northwest bank of Knox creek and thence leaving said survey W. 3,840 ps. crossing a creek and some of the branches thereof and along the spurs of the ridge dividing the waters of said creek and Peter's creek a branch of Sandy river to 3 poplars and a sugar tree by a small branch of Knox creek, thence N. 8,000 pos. crossing Knox creek at about 4 miles, Sandy river at 12 miles, the mouth of Turkey creek and up said creek and the northwest forks of the same, crossing Buffalo creek, Pigeon creek and the dividing ridge between Sandy and Guyandotte rivers and Gilberts creek twice, a branch of Guyandotte, to 3 sugar trees in a bottom of said river and about 20 poles below the mouth of Gilberts creek, thence N. 10 E. 4,450 pos. crossing Guyandotte river,
18 several small branches and some ridges to pointers, thence E. 6,620 pos. crossing Guyandotte river and several branches thereof to 3 sugar trees and a buckeye by a small branch of the same, being the northwest corner of a survey of said Nicholas of 480,000 acres, thence with the same S. 6,800 poles crossing Huffs or Cain creek to the beginning.

But it is always to be understood that the survey upon which this grant is founded includes 4,000 acres which having a preference by law to the warrants and rights upon which Robert Morris' survey is founded liberty is reserved that the said 4,000 acres shall be firm and valid and shall have the same effect and may be carried into grant or grants, and this grant shall be no bar in either law or equity to the confirmation of the title as before mentioned and reserved, with its appurtenances.

To have and to hold the said tract or parcel of land with its appurtenances, to the said Robert Morris and his heirs forever.

In witness whereof, the said Robert Brooke, Esquire, governor of the Commonwealth of Virginia, hath hereunto set his hand and caused the lesser seal of the said Commonwealth to be affixed at Richmond, on the 23rd day of June, in the year of our Lord one thousand 795, and of the Commonwealth the 19th.

[SEAL.] ROBERT BROOKE.

LAND OFFICE, RICHMOND, VA.

I hereby certify that the foregoing is a true copy from the records of this office.

Witness my hand and seal of office this 9th day of November, 1894.

W. R. GAINES, [SEAL.]
Register of the Land Office.

19 EXHIBIT "WYOMING, 1883," WITH BILL.

WEST VIRGINIA:

At a circuit court continued and held for the county of Wyoming, at the court-house thereof, on Tuesday, the 10th day of April, 1883, for the transaction of chancery business.

W. B. McCLURE, Com'r of School Lands for Wyoming County, *vs.* 500,000 ACRES OF LAND FORMERLY OWNED by A. D. Maupertuis and R. E. Randall, Trustee.	In the Matter of School Lands.

The prosecuting attorney of Wyoming county being present in court, this cause came on now to be heard upon the exceptions to reports of A. J. Lacy and W. T. Sarver, special commissioners herein, to whom this cause has been heretofore referred, and the matters arising, said exceptions being argued by counsel and considered by the court, said exceptions are sustained; and thereupon the Pittsburgh National Bank of Commerce tendered the court the following additional evidence of title, to wit, Exhibit No. 25, being a copy of mutilated decree, and Exhibit No. 26, being a certificate from the clerk of the circuit court of Logan county, and Exhibit 27, also a certificate of same, and the Pittsburg National Bank of Commerce having not shown that notice of filing the same nor any copy of same have been delivered to the other parties in this cause or their attorneys, as required by the decree entered herein at the last term, said Pittsburgh National Bank of Commerce not having shown that any of said papers marked Exs. 25, 26, and 27 were filed within 60 days from the date of said last-mentioned decree, as by said decree was required, the defendant R. E. Randall, trustee, objects and excepts to the filing of either of said papers marked Exs. 26, '7, '8, as aforesaid; which objection and exceptions, being considered by the court, are overruled, and the same are filed accordingly, and now this cause came on to be heard upon the report and supplemented report and petition filed herein and exhibits

20 therewith, upon the amended petition of R. E. Randall in the nature of an answer to the petition of the Pittsburgh National Bank of Commerce, upon the petition of the Pittsburgh National Bank of Commerce and the exhibits filed with each of said petitions, and upon the other papers and evidence in this cause, and was argued by counsel, upon consideration of all which the court is of opinion that at the time of the forfeiture of the land mentioned in this cause, or any part thereof, to the State for the non-payment of taxes or the failure to have the same placed upon the land books, or any part thereof, and at the time the title thereto or to any part thereof vested in the State for any of said causes, Robert E. Randall, trustee of the Swan estate, had the title thereto, superior to all other claimants and now has the right, either as creditor of A. D. Mauper-

tuis or those claiming under him or as owner of the same or of a portion of said tract and as owner of the whole or part thereof and as a creditor of A. D. Maupertuis, having a lien thereon, to redeem and pay the taxes upon the whole of said tract of 500,000 acres originally granted to Robert Morris, assignee of Wilson Cary Nicholas, on the 23rd day of June, 1795, and that the title of said Randall, trustee as aforesaid, at the time of said forfeiture was superior to that of the Pittsburg National Bank of Commerce or any other claimant of said land; and it being agreed and admitted in open court that the whole amount of taxes, costs, and interest due upon said tract is $8,000.00, and the commissioner of school lands, aforesaid, agreeing to and accepting that amount in payment in full of all taxes, costs, interest, and damages up to and including the year 1883, and it further appearing that said Robert E. Randall, trustee as aforesaid, has paid to the plaintiff this day in open court all taxes, damages, costs, and interest heretofore unpaid thereon and amounting to the sum of $8,000.00, it is therefore adjudged, ordered, and decreed that the payment aforesaid operates as a release and exoneration of all former taxes on said land, and that no sale thereof shall be made. It
21 is further ordered that the plaintiff pay said sum of $8,000 into the treasury of the State, less ten per cent. commission thereon, which is hereby allowed him, after paying the costs of this proceeding, and that he may report thereof, as required by law.

But nothing in said decree shall in anywise affect or impair the rights of the junior claimants or occupants within the boundaries of said tract of land whose titles or claims are protected by the constitution and laws of this State, and it is ordered that the clerk of this court certify a copy of this order to the auditor, and also certify, under the direction of said Randall or his attorney, a copy of this order to the assessor of the proper assessment districts for taxation.

And the Pittsburg National Bank of Commerce gives notice of its intention to appeal from this judgment of the court.

NOTE.—On margin of record is the following: "Certified to the auditor June 16, 1883."

A copy.

Attest: E. M. SENTER, *Clerk.*

EXHIBIT "WYOMING, 1897," WITH BILL.

Decree.

WEST VIRGINIA:

At a circuit court continued and held for the county of Wyoming, at the court-house thereof, on Thursday, the 30th day of September, 1897, for the transaction of chancery business.

Present: The Hon. Joseph M. Sanders, judge.

STATE OF WEST VIRGINIA
vs.
HENRY C. KING, ROBERT E. RANDALL, Trustee; John R. Reed, Trustee; Hamilton B. Bradshaw, Trustee; John Le Moyne, Trustee; Wm. H. Gardner, Trustee; John T. Ingraham, Trustee; Pittsburg Nat'l Bank of Commerce, a Foreign Corporation; The Unknown Heirs of Wm. Reed, Deceased; Ben E. Green, James Maybrick, Horace L. Maybrick, Caroline Van Roque, David W. Armstrong, George Collins, Adolph Van Roque, Harris T. Grome, Unknown Heirs of David B. Holbrook, Deceased; Unknown Heirs of Samuel Allison, Deceased; Jesse R. Irwin, Virginia Irwin,
22 Ethel Irwin, Clara Irwin, Alvin Irwin, Harris Hoyt, Maria E. Hoyt, C. F. Thomas, S. T. Dunham, W. C. Jones, Jesse T. Wills, Nathaniel B. Benson, and Others. } In Chancery.

This cause came on this day to be heard in open court upon the report of Commissioner D. A. Robertson, to whom this cause was heretofore referred, and upon all the pleadings, exhibits, depositions, evidence, and papers herein, and was argued by counsel, J. R. Robertson, Esq., commissioner of school lands of Wyoming county, a practicing attorney and solicitor of this court, and Col. Childres, Esq., appearing for plaintiff, and H. K. Shumate, Esq., appearing for defendant Henry C. King; and it appearing to the court that due and proper service of process herein has been had according to law upon all defendants and all persons interested in this suit, and that said suit is in condition for final hearing, and defendant Henry C. King having filed his answer and petition herein, claiming ownership of the Robert Morris 500,000-acre grant mentioned in plaintiff's bill by title regularly derived from the original patentee, Robert Morris, and offering to pay any taxes that may be found due upon said land, and praying to redeem the same from the forfeiture charged in said bill should said land be adjudged to be forfeited for any cause; and it appearing to the court that said tract of land was duly redeemed from all forfeitures by the defendant The Pittsburg National Bank of Commerce in the year 1882, and by defendant Robert E. Randall, trustee, in the year 1883, they being the then owners thereof whose rights said defendant, King, now holds by regular conveyances, and who has the right superior to all other claimants to redeem the land by paying the taxes chargeable thereon, with interest, and costs of this suit, and no other person claiming or appearing to have any right to redeem the same, and the said Henry C. King having this day paid to said J. R. Robertson, commissioner of school lands of Wyoming county, as admitted by the said J. R. Robertson in open court, the sum of twenty-one hundred and
23 ninety-eight and $\frac{65}{100}$ ($2,198.65) dollars, taxes and interest, due on the portion of Morris' 500,000-acre grant situate in said State of West Virginia, and the sum of eight hundred and seventy-one

and $\frac{43}{100}$ dollars, costs of this suit, and also the sum of $20.00, attorney's fee, which total sum of three thousand and ninety and $\frac{8}{100}$ dol- ($3,090.08) is hereby fixed by the court as the amount of cost, taxes, and interest chargeable upon said land *and* up to and including the year 1897, it is therefore ordered, adjudged, and decreed and declared that the said Henry C. King has the right superior to all others to redeem said lands, so far as the record in this case shows, and that the other defendants have no right, title, or interest therein or thereto, and that that portion of said 500,000-acre tract of land granted by the Commonwealth of Virginia to Robert Morris by patent dated June 23rd, 1795, which now lies in the State of West Virginia, and so far as the title thereto is in said State, and which said tract is adjudged and decreed to be now properly described, according to a resurvey thereof made in 1895 by W. D. Sell, C. E., under orders of the circuit court of the United States for the district of West Virginia and the western district of Virginia in causes therein pending, entitled Henry C. King *vs.* Conley Blankenship *et al.*, as follows, to wit:

(Further description omitted by stipulation.—Clerk.)—is hereby by the said Henry C. King fully redeemed, and all forfeitures of said land and taxes and interest heretofore charged or chargeable thereon are hereby released and discharged; and it is ordered and decreed that no sale of said land or any part thereof be made or had on behalf of said State of West Virginia; but it is provided that this redemption shall not affect the rights that any person not party to this suit may have, if any, under the provisions of section 3, article XIII, of the constitution of the State of West Virginia, such rights and claims not being in any manner adjudged or determined hereby. The defendant Henry C. King has leave to
24 withdraw from the papers in this cause any of his title papers which he may desire to withdraw by leaving certified copies of the same with the papers of this cause.

STATE OF WEST VIRGINIA, }
County of Wyoming, } *To wit:*

I, E. M. Senter, clerk of the circuit court of said county, do certify that the above is a true copy of the decree entered in the chancery cause of the State against Henry C. King, as appears of record in my office, to wit, Chancery Order Book No. 4, page 373, &c.

Teste: E. M. SENTER, *Clerk.*

25 EXHIBIT "HATFIELD NO. 1."

Henry A. Wise, Esq., governor of the Commonwealth of Virginia, to all to whom these presents shall come, Greeting:

Know ye that in conformity with a survey made on the 20th day of January, 1858, by virtue of land office treasury warrants Nos. 2194 & 22772, there is granted by the said Commonwealth unto Aly Hatfield a certain tract or parcel of land containing three hun-

dred and thirty acres lying in Logan county on the east side of the left-hand fork of Ben creek, and bounded as follows, viz:

Beginning at a white oak on the top of the fork ridge of said creek on the line of a survey made for Warren Alderson, thence down the hill S. 80½° W. 100 poles to a beech, lower corner to a survey made for said Hatfield, thence up said fork with the line of said survey N. 37° W. 24 poles to a beech and sycamore, N. 21½° W. 50 poles to a beech, N. 37° E. 114 poles to a beech, N. 15° E. 21 poles to two beeches in the mouth of a hollow, N. 39° W. 96 poles to a maple and sugar tree at the mouth of a hollow, N. 57° W. 72 poles to a sourwood and dogwood, lower corner to a survey made for Dempsey and with one line of same due N. 82 poles to a beech, maple and hickory, N. 9° W. 166 poles to a beech and birch, lower corner to a survey made for W. M. Smith, and with same N. 33° W. 87 poles to a beech, birch and sycamore on the creek bank, N. 15½° W. 104 poles to a beech and birch, N. 15° E. 46 poles to a white oak on a hillside, thence leaving said survey and up the mountain N 80½° E. 60 poles to two white oaks on the top of said fork ridge, thence down said ridge near the top S. 15½° E. 774 poles to the beginning, with appurtenances.

To have and to hold the said tract or parcel of land with its appurtenances to the said Aly Hatfield and his heirs forever.

In witness whereof the said Henry A. Wise, Esquire, governor of the Commonwealth of Virginia, hath hereunto set his hand
26 and caused the lesser seal of the said Commonwealth to be affixed at Richmond on the first day of February, in the year of our Lord one thousand eight hundred and fifty-nine, and of the Commonwealth the 83rd.

[SEAL.] HENRY A. WISE.

27 EXHIBIT "HATFIELD NO. 2."

Henry A. Wise, Esq., governor of the Commonwealth of Virginia, to all to whom these presents shall come, Greeting:

Know ye that in conformity with a survey made on the 20th day of June, 1857, by virtue of land office treasury warrants Nos. 22170 and 24290, there is granted by the said Commonwealth unto Aly Hatfield a certain tract or parcel of land containing four hundred and fifty acres, lying in Logan county on the left-hand fork of Ben creek, waters of the Tug fork of Sandy river, and bounded as follows, viz:

Beginning at a large beech in the mouth of the Road branch, upper corner to a survey made for William Smith, thence N. 11° W. 12 poles to a birch and white walnut, corner to a survey made for said Hatfield, thence up the hollow N. 31½° W. 22 poles to a hickory & dogwood, N. 6° W. 66 poles to a bunch of lynns on a point N. 77° W. 40 poles to a bunch of lynns S. 68° W. 56 poles to a poplar, dogwood and sugar tree, S. 15° E. 10 poles to a chestnut tree, dogwood in the head of a drain, N. 65½° W. 16 poles to a bunch of lynns N. 6½° W. 16 poles to a large black walnut, thence down the hollow N.

49° E. 56 poles to a chestnut oak on a point, N. 85° E. 84 poles to a bunch of lynns & maple near the head of said fork, thence crossing the ridge S. 81° E. 290 poles to a white oak on a hillside, upper corner to the Smith survey, thence with same S. 32½° W. 42 poles to a birch by a branch, S. 12½° E. 66 poles to a beech, S. 26° E. 63 poles to a beech, S. 8° W. 64 poles crossing a ridge to a sugar tree and gum sapling, S. 58° W. 44 poles to a beech N. 83° W. 42 poles to a beech N. 64° W. 59 poles to an ironwood, sugar tree, and beech sapling, N. 44½° W. 208 poles to a beech, S. 30° W. 14 poles to the beginning, with its appurtenances.

To have and to hold the said tract or parcel of land with its appurtenances to the said Aly Hatfield and his heirs forever.

In witness whereof the said Henry A. Wise, Esquire, governor of the Commonwealth of Virginia, hath hereunto set his hand
28 and caused the lesser seal of the said Commonwealth to be affixed, at Richmond, on the 1st day of February, in the year of our Lord one thousand eight hundred and fifty-nine, and of the Commonwealth the 83rd.

[SEAL.] HENRY A. WISE.

29 EXHIBIT "HATFIELD NO. 3" WITH BILL.

Copy of Deed.

Logan county court clerk's office, Deed Book "N," page 639.

L. D. Chambers, com'r, to Joseph Hatfield. } Deed.

This deed made on the 14th day of March, A. D. 1889, between L. D. Chambers, commissioner of school lands for Logan county, grantor, and Joseph Hatfield, grantee.

Witnesseth: That whereas at a sale of school lands made by the said grantor on the 2nd day of October, 1883, at the court-house of said county on a circuit court day to the highest bidder, the said grantee became the purchaser of tract No. 239, containing 140 acres of waste and unappropriated school land on Ben creek, a branch of Sandy river, in said county for the sum of $38.00, and paid $12.68 in money down and gave bond with security for $25.32, payable 12 months after date, bearing interest from the day of sale; and at the April term, 1884, of the circuit court of said county the said sale was confirmed and a decree made and entered among the chancery orders directing a deed to be made when the whole amount of the said purchase-money should be paid, and the same having been paid, including principal and interest to date; therefore for and in consideration of the premises and in pursuance of the said sale and decree of court, the said grantor doth hereby grant and convey unto the said Joseph Hatfield and his heirs and assigns forever all the right, title, interest and claim of the State of West Virginia in and to the said tract of land by the following metes and bounds, to wit: Beginning at two beeches on the foot of the hill, corner to a survey

made for Thomas E. Browning and John R. Browning, thence up the creek with same due north 50 poles —, gum, sugar tree, two beeches and white oak on a point, N. 25 W. 64 poles crossing
30 a point to a gum and two beeches near *near* the branch thence leaving said lines and up the branch N. 52 E. 18 poles to a beech, N. 13 E. 24 poles to a poplar on a branch, N. 35 E. 64 poles to a chest. oak on top of the hill, S. 38 E. 76 poles to a large chestnut oak, S. 7 W. 28 poles to 2 chestnut oaks, S. 26 E. 40 poles to a hickory, S. 1 E. 36 poles to a hickory S. 13 W. 40 poles — lynn, S. 13 E. 36 poles to a chestnut, S. 30 W. 100 poles to a forked hickory, thence — 52 W. 84 poles to the beginning, according to the plat and certificate filed with the papers and proceedings in said court to sell and convey the said tract of land.

Witness the following signature and seal.

L. D. CHAMBERS. [SEAL.]

WEST VIRGINIA, *County of Logan,* } *To wit:*

I, S. S. Altiser, a notary public in and for the county and State aforesaid, do certify that L. D. Chambers, whose name is signed to the foregoing deed, bearing date March 14th, 1889, has this day acknowledged the same before me in my said county.

Given under my hand this 25th day of March, 1889.

S. S. ALTISER,
Notary Public.

WEST VIRGINIA:

In Logan County Court Clerk's Office.

AUGUST 12TH, 1889.

The foregoing deed, together with the certificate of acknowledgment, was this day duly admitted to record.

Teste: S. S. ALTISER, *Clerk.*

A copy.
Teste: J. CARY ALDERSON,
Deputy for S. S. Altiser, Clerk.

(Stamp.)

31 EXHIBIT "HATFIELD NO. 4," WITH BILL.

Copy of Deed.

Logan county court clerk's office, Deed Book "K," page 409.

L. D. Chambers, com'r, to Joseph Hatfield. } Deed.

This deed made on the 24th day of August, A. D. 1888, between L. D. Chambers, commissioner of school lands for Logan county, West Virginia, grantor, and Joseph Hatfield, grantee.

Witnesseth: That whereas at a sale of school lands made by the

said grantor on the 3rd day of October, 1887, at the court-house of said county, on a circuit court day to the highest bidder, the said grantee became the purchaser of tract No. 388, containing 48 acres of waste and unappropriated school land on Ben creek of Sandy river in said county for the sum of $21.50, all paid in money down; and at the July term, 1888, of the circuit court of said county a decree was made and entered in the Chancery Order Book "C," page 322, confirming said sale and directing a deed to be made to the said purchaser. Therefore in consideration of the premises and in pursuance of the said sale and decree of court, the said grantor doth hereby grant and convey unto the said Joseph Hatfield and his heirs and assigns forever all the right, title and interest of the State of West Virginia in and to the said tract of land by the following metes and bounds, to wit: Beginning at 2 poplars, two sugar trees and hickory in the head of said Ben creek, corner to a 2,700-acre survey made for Warren Alderson, and with part of same S. 13 E. 124 poles to a water oak and two hickories near the top of the fork ridge of Ben creek, due west 6 poles to a large service on top of said ridge, thence up said ridge N. 51 W. 47 poles to a double chestnut oak on top of said ridge, N. 33 W. 56 poles to a chestnut oak, due north 36 poles to a double chestnut on the side of a hill, N. 24 E. 50 poles to a double chestnut, dogwood and large chestnut oak
32 in the main head of the right-hand fork of said Ben creek, N. 65 E. 20 poles to a chestnut oak, S. 40 E. 122 poles to a stake on the line of said 2,700-acre survey and with same N. 55 W. 86 poles to the beginning, according to the plat and certificate filed with the papers and proceedings in said court to sell and convey the said tract of land.

Witness the following signature and seal.

L. D. CHAMBERS. [SEAL.]

WEST VIRGINIA, *County of Logan,* } *To wit:*

I, S. S. Altizer, clerk of the county court of said county, hereby certify that L. D. Chambers, whose name is signed to the foregoing deed, bearing date on the 24th day of August, 1888, has this day acknowledged the same before me in my office, and thereupon the same is duly admitted to record.

Given under my hand this 31st day of August, 1888.

S. S. ALTIZER, *Clerk.*

A copy.
Teste:

J. CARY ALBERSON, *Deputy,*
For S. S. ALTIZER, *Clerk.*

(Stamp.)

EXHIBIT "HATFIELD NO. 5" WITH BILL.

Copy of Deed.

Logan county court clerk's office, Deed Book "I," page 464.

L. D. Chambers, com'r, to Joseph Hatfield. } Deed.

This deed made on this 10th day of November, A. D. 1884, between L. D. Chambers, commissioner of school land for Logan county, West Virginia, grantor, and Joseph Hatfield, grantee:

33 Witnesseth: That whereas heretofore, at a sale of school land made by U. S. Hinchman, late commissioner for said county, at the March term of the circuit court of said county in the year 1875, the said grantee became the purchaser of a tract of school land No. 36 containing 72 acres on Ben creek, a branch of Sandy river in said county, and on the left-hand fork of the left-hand fork of said creek for the sum of $10.00, all paid down in money, and whereas by a decree of the circuit court of said county made and entered at the October term, 1884 (see Order Book, page 225), the said grantor was required to make to the said grantee a proper and apt deed upon payment of the costs of his petition filed in said court, and the said grantee having paid the full amount of said costs. Therefore for and in consideration of the premises, the said L. D. Chambers, commissioner of school land for said —— doth hereby grant and convey unto the said Joseph Hatfield and his heirs and assigns forever all the right, title and interest of the State of West Virginia in and to the said tract of land bounded as follows, to wit: Beginning at two lynns and black walnut at the foot of the mountain where the road crosses to Beech creek, thence down the hollow N. 46½ E. 38 poles to a white oak, S. 87 E. 68 poles to a white walnut and beech on a point, S. 11½ E. 12 poles to a beech in the bottom near the mouth of the road hollow thence down the creek S. 57½ E. 52 poles to two beeches, S. 25 E. 50 poles to ironwood and poplar sapling S. 41 E. 37 poles to a beech at the mouth of said fork, thence up the same S. 41 W. 30 poles to an ironwood and lynn at the forks of said fork S. 10 E. 28 poles to a beech, S. 80 W. 18 poles to a poplar on a point, S. 35 W. 18 poles to two lynns on the right-hand fork, N. 44½ W. 176 poles to a birch on the road fork S. 57 W. 20 poles to a poplar near the branch N. 21 W. 14 poles to a maple and beech on a point N. 84 W. 24 poles to the beginning, and the said grantor will warrant specially the property hereby conveyed.

Witness the following signature and seal.

L. D. CHAMBERS. [SEAL.]

34 STATE OF WEST VIRGINIA, *Logan County,* } *To wit:*

I, J. B. Wilkinson, a notary public in and for the county and State aforesaid, do certify that L. D. Chambers, whose name is

signed to the foregoing deed, bearing date the 10th day of November, 1884, this day acknowledged the same before me in my county aforesaid.

Given under my hand this 24th day of June, 1886.

J. B. WILKINSON,
Notary Public.

In Logan county court clerk's office, June 24th, 1886.

The foregoing deed was this day duly admitted to record.

S. S. ALTIZER, *Clerk.*

A copy.
Teste:

J. CARY ALDERSON, *Depuly,*
For S. S. ALTIZER, *Clerk.*

(Stamp.)

35 *Demurrer.*

(Filed June 8th, 1899.)

Circuit Court of the United States for the District of West Virginia.

HENRY C. KING
vs.
S. D. HATFIELD ET ALS.

The defendants, not confessing any or all the matters in complainant's bill alleged, demur to said bill and for cause of demurrer show:

That it appears from said bill that the title to the land claimed by complainant was, by the constitution of West Virginia, forfeited to said State December 31, 1888, and that the title thereto vested in Joseph Hatfield, under whom these defendants claim, as to the tracts of three hundred and thirty and four hundred and fifty acres in said bill mentioned; and

That it being provided by the act of February 28th, 1893, under which the suit was brought in which complainant claims to have redeemed the land claimed by him, that the suit should be dismissed as to any lands that should appear to have been sold in any proceeding for the sale of school lands, said suit could not properly be maintained nor any decree of redemption properly entered that should affect the lands claimed by these defendants under the sales thereof to said Joseph Hatfield by the commissioner of school

36 lands, therefore complainant ought not to maintain this suit.

Wherefore these demurrants pray the judgment of the court whether they should be required to answer this bill.

S. D. HATFIELD AND
NANCY C. RUTHERFORD,
By H. C. FLESHER, *Their Attorney.*

I, H. C. Flesher, counsel for the above-named demurrants, hereby certify that the foregoing demurrer to the bill of complaint herein is, in my opinion, well founded in point of law.

H. C. FLESHER.

STATE OF WEST VIRGINIA, }
County of McDowell, } *ss*:

H. C. Flesher, counsel for the above-named defendants, being duly sworn, doth say that the foregoing demurrer is not interposed for delay.

Subscribed and sworn to before me this — day of June, 1899.

L. B. DELLICKER,
Clerk C. D., W. Va.

Order Setting Down and Submitting Demurrer.

At a circuit court of the United States for the district of West Virginia, continued and held at Charleston, in said district, on the 8th day of June, 1899, the following order was made and entered of record, to wit:

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HENRY C. KING }
vs.
S. D. HATFIELD ET AL. }

This day came the parties, by their counsel, and the defendants, by their counsel, tendered their joint demurrer to complainant's bill of complaint, and the same is by the plaintiff set down for argument, and, being argued, is submitted to the court for consideration and by the court taken under advisement.

Order Overruling Demurrer.

And at another day, to wit, on the 16th day of May, 1900, the following order was made and entered of record, to wit:

HENRY C. KING }
vs.
S. D. HATFIELD ET AL. }

This cause having heretofore been heard upon plaintiff's bill and exhibits and the demurrer of the defendants thereto and the questions arising thereon having been argued by counsel and submitted to and taken under advisement by the court, and the court, having duly considered the same and being now fully advised in the premises, is of opinion to overrule said demurrer.

It is therefore ordered that said demurrer be, and the same is hereby, overruled and the defendants are assigned to answer said bill on or before the rule day of this court next ensuing.

38 *Opinion.*

HENRY C. KING
vs.
S. D. HATFIELD ET AL.

This is a suit to set aside and remove clouds upon complainant's title to portions of a tract of land claimed by him. The case is now heard upon the bill and demurrer.

The complainant claims a tract of five hundred thousand acres of land under a grant issued to Robert Morris by the Commonwealth of Virginia June 23rd, 1795, and under mesne conveyances from the grantee to the complainant, which tract is situated partly in the State of West Virginia, in Logan, Mingo, Wyoming, and McDowell counties. He files as exhibits with his bill title papers which show a regular chain of conveyance to him, and alleges that he is in actual possession of said tract. He also files as exhibits copies of two patents, one for four hundred and fifty acres and one for three hundred and thirty acres, issued to Aly Hatfield, now deceased, by said Commonwealth in 1899, and of three deeds from the commissioner of school lands of Logan county to Joseph Hatfield, now deceased, for tracts of 72, 48, and 140 acres, respectively, executed in the years 1884, 1888, and 1889, under proceedings on behalf of the State of West Virginia for the sale of waste and unappropriated land of the State. The defendants claim these tracts by inheritance, but have had no possession of them. Upon the face of the bill it is apparent that the title to the land in dispute is in the complainant, and that the muniments of title under which the defendants claim confer upon them no right whatever, unless the complainant has lost his title thereto by forfeiture of his land for non-assessment of taxes under the provisions of the constitution of West Virginia, and by virtue of such forfeiture that title has became vested in the defendants, as the defendants claim.

It appears from the bill that by virtue of certain convey-
39 ances made by John Peter Dumas, who, as trustee for the creditors of James Swan's estate, was the owner of the Morris grant, and by virtue of a certain judicial sale of three-fourths thereof, the validity of which was disputed by the successors in trust of Dumas, which conveyances and sale were made before the organization of the State of West Virginia, one Louis Antoine des Verges de Maupertuis (sometimes called Mauperture), in 1872 and earlier, claimed three hundred thousand acres of said tract; Robert E. Randall, trustee, claimed two hundred thousand acres thereof and a mortgage upon said three hundred thousand acres for the unpaid purchase-money therefor, and one Anthony Lawson claimed an undivided three-fourths of the entire five hundred thousand acres under said judicial sale. This was the status of the title when the constitution of West Virginia was adopted in 1872. The complainant claims and exhibits title under all said persons.

Although not much more than three hundred thousand acres of said tract actually lies in the State of West Virginia, the rest being

in Virginia and Kentucky, the said Anthony Lawson and his grantees, James Black and Abraham Suydam, were charged upon the land books of Logan county with taxes upon the three-fourths interest or claim at three hundred and seventy-five thousand acres from 1865 to 1878, when said interest was reduced by the county court to one hundred thousand acres, after which time said interest was charged to them and to their grantee, the Pittsburg National Bank of Commerce, up to and including the year 1882, all which taxes were paid. Notwithstanding the charging and collection of such taxes, said Randall, trustee, and the heirs of said Maupertuis, then deceased, being unacquainted with the location of said land, had the whole five hundred thousand acres entered upon the land books of Wyoming county in 1869, and charged with taxes thereon,
40 the Maupertuis interest as three hundred thousand acres, and the Randall interest as two hundred thousand acres. In 1871 said two-hundred-thousand-acre interest was sold to the State for unpaid taxes of 1870, and in 1877 the three-hundred-thousand acre interest was sold to the State for the unpaid taxes of 1874–'5, the prior taxes having been paid.

Afterwards, said land not having been redeemed within one year from the sale, as provided for by the statute, a proceeding was instituted in the circuit court for Wyoming county by the commissioner of school lands on the part of the State to sell the said five-hundred-thousand acre grant for the benefit of the school fund, whereupon the said Randall filed his petition to redeem, and the Pittsburg national bank presented a protest against such redemption, but by a decree entered therein April 10th, 1883, it was decreed that Randall, as trustee of the Swan estate and as creditor of Maupertuis, had the superior title and the right to redeem said five-hundred-thousand acre grant, and, the back taxes, interest, and costs being paid into court, the land was decreed to be thereby exonerated and released from all taxes up to and including the year 1883. The Pittsburg national bank appealed from this decree, holding the Randall title to be superior, but the appeal was dismissed upon the ground that the proceeding did not contemplate a contest and adjudication of rival claims of title. McClure *vs.* Mauperture, 29 W. Va., 633.

The decree aforesaid ordered that the clerk certify a copy thereof *the* the auditor of the State, and "also to certify, under the direction of Randall or his counsel, a copy thereof to the assessors of the proper assessment districts for taxation." The said five-hundred-thousand-acre tract was not, however, again charged upon the land books of any county of the State of West Virginia in which any part
41 thereof is situated within the five years next succeeding the year 1883, and in 1894 the State brought another suit in said Wyoming county circuit court against the present complainant, King; the said Randall, trustee; the said Pittsburg National Bank of Commerce, and sundry others under *which* King claimed for the purpose of subjecting to sale for the benefit of the school find so much of said five-hundred-thousand-acre grant as was then vested in the State by alleged forfeiture thereof for the non-assessment of

State taxes thereon for the five successive years after the year 1883, and the said King filed his answer and petition therein, denying that said land was forfeited, but offering to pay any taxes that ought to have been charged thereon, with interest and costs of said suit, and on September 30th, 1897, upon the payment of the taxes, interest, and costs fixed by the court therein, a decree was entered adjudging that said King had the right to redeem said land and declaring said land, so far as the title thereto was in said State, to be redeemed and all forfeitures and taxes charged or chargeable thereon to be released and discharged, said decree providing, however, in conformity with the statute under which the suit was brought, that said "redemption shall not affect the rights that any person not party to this suit may have, if any, under the provisions of sec. 3 of article 13 of the constitution of the State of West Virginia."

In 1859 Aly Hatfield procured from the officers of the Commonwealth of Virginia who were by law charged with the duty of issuing grants of the waste and unappropriated land of the Commonwealth the instruments purporting to be grants for said 450 and 330 acre tracts, and under proceedings in the circuit court of Logan county instituted by the commissioner of school lands of that county for the sale of waste and unappropriated land Joseph Hat-
42 field procured a deed from said commissioner for a tract of 72 acres of land November 10th, 1884; for 48 acres August 24th, 1888, and for 140 acres March 14th, 1889, upon a sale October 2nd, 1883. The defendants are sole heirs-at-law of Aly and Joseph Hatfield, who are now deceased.

As to these patents and deeds the complainant in his bill alleges: "That at the time said pretended grants were issued the land therein described was wholly part and parcel of said Morris grant and was owned by your orator's said predecessor in title and was not waste and unappropriated land or otherwise belonging to said Commonwealth nor within the power of the said Commonwealth or of any officer thereof to grant and dispose of, as said Aly well knew, and said instruments were and are wholly null and void, but being in due form they purport and appear upon their faces to convey title to the land therein described and can be shown to be invalid only by evidence *aliunde*.

That all proceedings by said commissioner of school lands were purely *ex parte* and non-judicial and without notice to your orator's predecessor in title, the then owner of the said Morris grant, and at the time said tracts were reported and sold and said deed executed by said commissioner of school lands the said lands were not waste and unappropriated nor forfeited, nor for any other cause subject to sale in any manner on behalf of the State of West Virginia, as both said commissioner and said Hatfield well knew, and said proceedings were wholly without authority of law and were *coram non judice* and void and gave to said commissioner no right or authority to make sale of said land or to execute said deeds therefor, and the same are fraudulent, null, and void; but said deeds and proceedings, being in form of law and being regular upon their faces, appear to

convey title to the land therein described, and the invalidity of said deeds can only be made to appear by evidence *aliunde*."

43 The complai-ant in his bill refers to sections 3 and 6 of article 13 of the State constitution; contends that the provision making it the duty of the land-owner to have his land entered on the land books has never been made operative by appropriate legislation, the duty of entering and charging lands devolving upon the public officers without the aid of the owner under a complete statutory system; that the provision has no application to land that was on the land books at the time of the adoption of the constitution, and that by the provision in the decree of redemption in 1883 Randall, complainant's predecessor in title, did all that could *be* reasonably be required of him, in the absence of statutory direction, to cause the land to be re-entered upon the land books and charged with taxes if the officers of the State had performed their statutory duty. The complainant alleges that the defendants claim that the title of complainant's predecessor in estate was forfeited in 1888 "by operation of said constitution" by reason of non-assessment of taxes, and became thereby transferred to Joseph Hatfield to the extent of said 450 and 330 acre grants, the taxes on them having been paid, but the complainant avers that he "is advised and claims that the said provision of said constitution purporting to forfeit lands for the non-assessment of State taxes for five successive years is in contravention of the Constitution of the United States, and is therefore null and void, and the title thereto could not and did not vest in defendant- to any extent or in any manner, and that whether said provision be void or for any reason valid it is not the true meaning and intention of said constitution to vest in any other persons title to any land, forfeited or otherwise, to which the title was not in the State at the time of the adoption of said constitution, and, so far as said constitution purports or attempts, if it does, to transfer to or

44 to vest in any person other than the former owner the title to any land thereafter to become forfeited for non-assessment, your orator is advised and claims that said constitution is in contravention of the Constitution of the United States and is null and void."

The foregoing being, in brief, the princip*le* matters set out in the bill bearing upon the question to be considered, the defendants interposed their demurrer on the ground "that it appears from said bill that the title to the land claimed by complainant was by the constitution of West Virginia forfeited to said State December 31st, 1888, and that the title thereto vested in Joseph Hatfield, under whom these defendants claim, as to the tracts of 330 and 450 acres in said bill mentioned, and that it being provided by the act of February 23rd, 1893, under which the suit was brought, in which complainant claims to have redeemed the land claimed by him, that the suit should be dismissed as to any lands that should appear to have been sold in any proceeding for the sale of school lands, said suit could not properly be maintained nor any decree of redemption properly entered that should affect the lands claimed by these de-

fendants under the sales thereof to said Joseph Hatfield by the commissioner of school lands."

So much of article 13 of the constitution of West Virginia, relied upon by the defendants, as it is material to consider is contained in sections 6 and 3, as follows:

SEC. 6. It shall be the duty of every owner of land to have it entered on the land books of the county in which it, or a part of it, is situated, and to cause himself to be charged with the taxes thereon, and pay the same. When for any five successive years after the year 1869, the owner of any tract of land containing one
45 thousand acres or more, shall not have been charged on such books with State tax on said land, then by operation hereof, the land shall be forfeited and the title thereto vest in the State. But if, for any one or more of such five years, the owner shall have been charged with State tax on any part of the land, such part thereof shall not be forfeited for such cause.

SEC. 3. All title to lands in this State heretofore forfeited, or treated as forfeited, waste and unappropriated, or escheated to the State of Virginia, or this State, or purchased by either of said States at sales made for the non-payment of taxes and become irredeemable, or hereafter forfeited, or treated as forfeited, or escheated to this State, or purchased by it and become irredeemable, not redeemed, released or otherwise disposed of, vested and remaining in this State, shall be, and is hereby transferred to, and vested in any person (other than those for whose default the same may have been forfeited or returned delinquent, their heirs or devisees,) for so much thereof as such person has, or shall have had actual continuous possession of, under color or claim of title for ten years, and who, or those under whom he claims, shall have paid the State taxes thereon for any five years during such possession; or if there be no such person, then to any person (other than those for whose default the same have been forfeited, or returned delinquent, their heirs or devisees,) for so much of said land as such persons shall have title or claim to, regularly derived, mediately or immediately from, or under a grant from the Commonwealth of Virginia, or this State, nor not forfeited, which but for the title forfeited would be valid, or who, or those under whom he claims has, or shall have paid all State taxes charged or chargeable thereon for five successive years after the year 1865, or from the date of the grant, if it shall — issued since that year."

* * *

46 The question that the court has now to determine is—

Whether the title that was originally vested, by valid grant, in Robert Morris and appears to have descended by regular course of record conveyances to the complainant has, in fact, been transferred, by due process of law, to the defendants to the extent of the land described in the patents and deeds acquired and claimed in hostility to the said Morris grant. The answer to this question involved not only the interpretation of the above-mentioned provisions of the constitution of West Virginia, but the question of their consistency or inconsistency with the Constitution of the United States and their consequent validity or invalidity.

It is contended on behalf of the complainant, both in the bill and in the argument of counsel, that the provisions of sec. 6 of the constitution do not apply to any land that, like complainant's, was on the land books when the constitution was adopted and have not been made operative upon any land by proper legislation and are not self-enforcing; that complainant's predecessor in title, Randall, did all that was reasonably in his power to have the land now claimed by complainant re-entered and charged with taxes on the land books after the redemption thereof, in 1883, and that no forfeiture can be claimed because that was not done; that the constitution does not intend, by said sec. 3, to transfer to third persons titles forfeited after the adoption of said constitution, and that, so far as the said constitution does purport or undertake to forfeit the title to land and vest it in third persons or in the State without any judicial proceeding or without any right of redemption, to that extent it is in contravention of the Constitution of the United States. The defendants dispute these propositions.

Provisions somewhat similar to that contained in said section 6 of article 13, requiring land-owners to enter their lands on the
47 land books, are found in the statutes of Virginia in the acts of February 5th, 1810, and February 27th, 1835. It was recited in the former act "that many persons omit to enter their land upon the land books and thereby elude the payment of any revenue thereon," and provided that "if any person having title to a tract or tracts of land in this Commonwealth shall fail to enter the same on the commissioner's book of that county in which the land lies within eighteen months after the passage of this act the same shall be forfeited to the Commonwealth."

By the act of February 9th, 1814, forfeitures under the act of 1810 were released and a system provided for the entering and charging of lands with taxes by the commissioners of the revenue.

The act of 1835 recited that it was known to the General Assembly that "many large tracts lying west of the Alleghany mountains, granted before April 1st, 1831, never were or for many years last past have not been entered on the books of the commissioners of the revenue," required that "every owner or proprietor of any such tract or parcel of land" should on or before July 1st, 1836, enter or cause to be entered on said books all such lands owned by him, her, or them and have the same charged with all the taxes and damages in arrear or properly chargeable thereon and pay the same, and prescribed the penalty of forfeiture for their failure to do so. This act applied only to lands omitted prior to 1831. Lands other than those that "never were or had not for many years past" been on the books could well be found and entered by the commissioners without assistance from the owners.

An act passed April 1st, 1831, provided that no person in any suit then pending or thereafter to be brought for the recovery of land west of the Alleghany mountains against a *bona fide* claimant under a grant from the Commonwealth issued prior to the
48 passage of the act, who had had said land entered on the land book- and paid all taxes thereon, should be allowed to

give in evidence any grant from the Commonwealth in support of his, title to the demanded premises unless he should show that he, too, had had the demanded land entered upon the land books and charged with taxes and had paid all taxes chargeable thereon. The case of Taylor *vs.* Burdett, 11 Leigh., 347, arose under this act, in 1835, upon a grant dated June 16th, 1786, under which the plaintiff claimed and which was excluded by the circuit court. In reversing this ruling the court of appeals, per Judge Tucker, said in part:

"First, as to entering the land with the commissioner. This was first required by the act of 1810, and accordingly it appears that the lands were on the commissioner's books in 1811, for they are on the auditor's list as delinquent for that year. Now, if they were once on the books it would seem that this duty was fulfilled, as it was not required to be repeated every year."

The reasoning and authority of that case seem conclusive against any forfeiture of the Morris grant, so far as forfeiture is the penalty of any fault, default, or delinquency of the owner, for it appears that said tract had been entered by its owners and continued on the land books of both Wyoming and Logan counties long before, at the time of, and long after the constitution of West Virginia was adopted, and, in the language of Judge Tucker, "it would seem that that duty was fulfilled, as it was not required to be repeated every year," at least not by express terms nor by any inference warrantable when so terrible a consequence as the forfeiture of thousands of dollars' worth of property is to follow such inference. Only the most clear and cogent language or a manifest condition of affairs demanding it for public well-being would warrant
49 such a construction of the first clause of sec. 6 as would extend the duty of land-owners, beyond a primary compliance with the requirement of that clause, with a penalty of forfeiture for failure in that respect, in spite of the fact that the State has nowhere and at no time made definite provision for the discharge of such duty by the owner, but has, by a system the most elaborate and complete, provided for the entering and taxing of lands by her public officers.

The early Virginia acts were occasioned by the fact that many large tracts of land "never were or had not been for many years" entered on the land books, and consequently were not within the knowledge of the taxing officers. When they were once put on the books and went into the hands of the officers those officers could see to the taxing of them thereafter, which was a part of their official duty, and after 1835 Virginia did not require land to be entered by the owners under penalty of forfeiture.

After the erection of the State of West Virginia, and after the close of the civil war, during which court-houses were burned, land books lost, records destroyed, many land-owners killed or scattered, and the evidence of ownership of land left in such condition that the public officers could not in many instances, either from their own knowledge or from any record information, properly enter and charge all lands, it was made the duty of land-owners to have

their lands entered on the land books of the proper counties. When that was once done the land came under the control of the public officers, and so complete and specific is the provision of the law governing the subject (chap. 29 of the Code of West Virginia) existing prior to the formation of the State and ever since that a tract of land once on the land books will ever after continue on them and be charged with taxes year after year
50 so long as the officers of the State, appointed and paid for the purpose, attend to their duties. It is not in the power of the owner to prevent such charging, and nothing he can do can get the land off of the books. Only in the event of a sale to the State for unpaid taxes, in which event it ceases to be chargeable, can the land get off of the books, except solely by the fraud or negligence of some public officer. To hold, then, that the duty imposed on the land-owner by said sec. 6 is not fulfilled if at the time of its adoption or afterwards he had his land entered on the land books and charged with taxes is not required by the language of that section nor by anything to be found in the condition of things existing at its adoption or afterwards. Indeed, it seems not even to be permitted by the language: "But if for any one or more of such five years the owner shall have been charged with State tax on any part of the land, such part thereof shall not be forfeited for such cause." This applies to the whole tract as well as to "any part" of it. To what time do the words "any one or more of such five years" refer if not to any one or more of "any five successive years after the year 1869"? Is not all forfeiture under this section expressly prevented by a charging of the land for any year, at least if charged before the full five years next after 1869 expired? It is clear to my mind that if the tract or any portion of it was entered within said five years, as provided for in sec. 6, it could not — forfeited.

If the position here taken is sound, there could be no forfeiture of the land in question by the constitution as a penalty for the default of the owner. Any forfeiture for non-assessment must be independent of any act or default of the owner; but suppose the duty of the land-owner to have his land entered, etc., arises every time they get off the books for any cause, what is the situation presented by this case?
51 The Supreme Court in King *vs.* Mullins, 171 U. S., 104, a case arising upon the provision in question, answering the argument that "the land may be forfeited by reason of the land-owner not having been, in fact, charged on the land books with the taxes due from him, although he was not responsible for such neglect," said: "We do not so interpret the State constitution or the statutes enacted under it. If the land-owner has done all that is reasonably in his power to have his land entered upon the land books and to cause himself to be charged with taxes thereon, no forfeiture can arise from the owner not having been charged on such books with the State tax. The State could not acquire any title to the lands merely through the neglect of its agent having custody or control of its land books."

It cannot be denied that the owner of the Morris grant did all

that, in the language of Mr. Justice Harlan, was "reasonably in his power to have his lands entered upon the land books and to cause himself to be charged with taxes thereon" In determining what is reasonably in the power of the land-owner, and what negligence, which can occasion the State no loss whatever, should subject him to the dire consequence of losing his land, the State, through her agents, being in default, we must bear in mind that we are dealing with forfeitures, odious in law, which courts will not enforce where there is any escape; that the land-owner is without precedent, guide, or direction for the discharge of his duty, and that the requirement is *in invitum.*

It appears that the land had been purchased for the State at a sale for delinquent taxes prior to 1883, and the State, through her commissioner of school lands, had instituted proceedings in the circuit court to dispose of the land under a statute which permitted the owner or person in whose name it was sold to come in and redeem.

52 The State, the claimant, and the land were all before the court, and it was ordered by the very same decree that permitted payment to the State of the redemption money which was accepted and applied by her that the clerk of the court, a public officer charged by the statute with that duty, should certify a copy of the decree to the State auditor, and also certify copies to the county assessors for taxation, the latter under the direction of Randall or his counsel. This seems to have been all that the court, the State, and Randall supposed to be necessary to insure the re-entering of the land upon the land books. It was in effect a direction by the court as to what was necessary in the matter. As the law authorizing assessors to enter the land upon the land books had very recently been repealed and that duty required to be performed by the clerks of the county courts, and as the circuit court clerk was required by law, independently of the direction in the decree, to certify to the clerk of the county court an abstract of the decree, and of that clerk to enter the lands, this requirement of the decree that a copy be certified to the assessors was ineffectual and unimportant, and it is immaterial whether or not it was complied with. This decree having been passed by the court upon the petition of Randall, he had the right to rely upon it, and had reason to suppose that the land would go back on the land books without further action by him, and that there was nothing more that he, a non-resident trustee, need do, neither the constitution, the statute, nor anything else but the decree giving any direction or hint as to how he should proceed to have his land entered.

When the fact that the land is subject to entry and taxation upon the land books has been brought to the attention of the officers or agents of the State charged by statute with the matters of assessment and taxation, it should seem that the land-owner should not

53 suffer the forfeiture and transfer of his land to the State or to a stranger because of the negligence of such officers, yet if the State since 1883 or these defendants has or have acquired any title to the land claimed by the complainant, it has been "merely through

the neglect of the agent of the State having custody or control of its land books," but for which neglect no question of forfeiture could possibly have arisen.

I do not overlook the proceeding in the court of Wyoming county and the decree of redemption, so called, of 1897. In that suit King denied that the land was forfeited, but offered to pay any taxes that might be chargeable thereon. The decree does not adjudge that the land was forfeited, but releases it from the taxes chargeable and any forfeitures that there may have been, subject to the rights of persons, not parties, claimed under the constitution. The principle effect of the decree of September, 1897, is to eliminate the State and cut off the general defense of title outstanding in the State, which the defendants might otherwise have sought to rely upon. This is not their defense, however, except as to the tracts sold by the commissioner of school lands, as to which they say the decree was improperly entered; their contention is that the title to the land in controversy is in them and not in the complainant, or the State.

If the construction of the provisions of the State constitution under consideration and the question of what acts and facts bring lands within their operation rested ultimately with this court instead of the State supreme court, I might be content to pursue this discussion no further, but being uncertain whether that court will concur in the views I have expressed, I prefer to rest my decision of this cause also and principally upon a decision of the graver and more fundamental question presented by this record—the question of the
54 constitutional validity of those provisions; and in reaching my conclusion I am not unmindful of the respect due to the laws and authority of the State, but I am controlled by what I consider to be the spirit and meaning of the Federal Constitution. The Constitution is not the supreme law of the land if it be not given effect according to the letter and spirit in all the States alike at all times and in all circumstances, or if all or any doubts be resolved against it.

It is contended on behalf of the defendants that by reason of the fact that the tract of land now claimed by complainant was not charged with taxes upon the land books within the five years following the redemption thereof, in 1883, the title of said land, then held by Reed, trustee, under whom the complainant claims, became forfeited on the last day of the year 1888, and vested, by force and operation of the constitution, in Joseph Hatfield to the extent of said 450 and 330 acre tracts, which are not affected, and do not purport to be affected, by the decree of the Wyoming county circuit court of 1897, and that said decree should not affect the "school land" tracts, because the suit in which it was rendered should have been dismissed as to such tracts.

Concerning the lands claimed by the defendants, it is sufficient to say that the patents under which they claim, having been issued after the grant to Morris, and when the title to that grant was unquestioned and unquestionable, gave no right whatever to the land embraced in them within the Morris grant, and the proceedings in the circuit court of Logan county had before the five years after 1883

had expired were unauthorized and were *coram non judice*, and the deeds made thereunder were nullities. If, then, the defendants have title or any right to any of the land embraced in the
55 Morris grant and in said patents and deeds, they have got it solely by operation of the constitution of West Virginia.

It is claimed by counsel for the complainant that sec. 3 is not a law, but a legislative grant operating only upon land that was, at the time the constitution was adopted, subject to the disposal of the State; that the words "shall be and is hereby transferred to and vested in" are not words of law making but words of grant *in presenti* and cannot affect land to which the State did not have title in 1872, so as to convey it to some person, perhaps not then in being, when afterwards the State should happen to acquire title and such person should come into being, and that therefore the lands claimed by the defendants do not come within the operation of that section, nor any lands within the saving clause of said decree of 1897. It cannot be denied that there is great force in this position; but as the section speaks of lands "hereafter forfeited," and as the act of February 23rd, 1893, commonly called the "school-land act" seems to provide for the redemption only of lands forfeited to West Virginia, which redemption is not to affect any lands held under said section 3, and as there could be no lands forfeited to West Virginia for non-assessment prior to the adoption of the constitution, that section would seem to have no operation upon lands forfeited by the constitution, unless construed to operate in the future, which seems to be the construction given to it by the State court, so far as can be determined from expressions found in the few cases in which it has been before it in any way.

Giving, then, to these provisions of the constitution and the school-land act the application contended for by the defendants, we have the result that by mere act of ostensible legislation, without any proceeding or action whatever, judicial or otherwise, before or afterwards, the full legal and equitable fee-simple title to land is
56 taken out of one private person without compensation and vested without consideration in another private person for his private use and benefit. This result can only be avoided by adopting a construction of the provisions of the constitution and act in question that would leave them little meaning, or by denying them legal validity so far as they apply to cases like the present. Can such a result legally obtain under the Constitution of the United States?

It was held by the Supreme Court in King *vs.* Mullins, *supra*, that this forfeiture provision of the West Virginia constitution, when considered and applied in connection with the statutes that authorize a suit to be brought by the State against the claimant of the land affected, in which all questions of title, location, and boundary, etc., can be tried, and in which the land-owner can redeem, does not deprive the land-owner of his property without due process of law, the court reserving its opinion upon the question whether the State constitution "alone considered" is consistent with the National Consti-

tution until the decision of that question should become necessary. That question is now presented.

In the Mullins case the defense was merely that the title claimed by the plaintiff was outstanding in the State, not that it had been by forfeiture vested irredeemably in the defendants. There was nothing that appeared in the record of that case to show that there was any legal obstacle to the full and effectual redemption by the plaintiff of every acre of the grant claimed by him. It had previously been held by the State court that these statutes had no application, and that no suit provided for by them could be instituted, except as to land the title to which had theretofore vested in the State in some legal way, and it would seem that the inquiry as to
57 what is due process of law should be confined to the act of deprivation by which the State had acquired the title and the land-owner had lost it, without looking to any later provision by which the person deprived may in some cases have restitution. But in cases like the present there is no refuge in the statute and the suit thereunder.

The suit of the State cannot, according to the statute, be maintained against any land to which the title is not then in the State. Sec. 6, act February 23rd, 1893, provides: "And if at any time during the pendency of any suit, it shall appear to the court that any part of any tract of land in question therein has been sold by the State in any proceeding for the sale of school lands, and the taxes regularly paid thereon since such sale, or is held by any person under sec. 3 of article 13 of the constitution of this State, the bill, as to such part, shall be dismissed, and the suit proceeded with to a final decree as to the remainder." If that fact should not appear to the court and the suit should proceed as to such land and a claimant be permitted to pay the taxes thereon and get a decree of redemption, the same act (sec. 17) provides: "But such redemption shall in nowise affect or impair any right, title or interest any other person may have in said real estate or any part thereof, by purchase from the State, or under and by virtue of sec. 3 of article 13 of the constitution of this State." This provision is found in all prior acts, and it would result, independently of this provision, that if the constitution had previously transferred the title of the claimant to another person, no proceeding that the legislature could devise could divest that other person of the title and revest it in the original owner. And since the title must be divested before it can revest, it likewise results that where it is vested by the constitution in any person the former owner of that title must have been deprived of it by the
58 constitution or by something anterior to it, and not in any measure by any proceedings subsequently had. Due process must be found, in such a case, in the operation of deprivation—in the constitution alone considered—and if, as I understand the opinion of the Supreme Court in King *vs.* Mullins, the constitution was held to be valied by reason of the support given by the judicial proceedings provided by statute and the right of redemption therein, then that provision of the constitution is inoperative where that support fails; that the right of redemption, which put the land-owner in a

position where he had no substantial right of complaint—none that he could not remove by a payment of his taxes—was the most potent consideration with the court in sustaining the validity of the constitution and statutes considered as a system, upon reasoning that does not seem to me to be wholly satisfactory, is obvious from the declaration of the court that that part of the code "which has the most direct bearing on the question" is the provision by which the former owner is permitted "to redeem such part or parts of any tract of land so forfeited or the whole thereof as he may desire" (p. 426–6), and which it deemed a "remedy whereby he could be relieved from such forfeiture" (p. 423); but, as has been seen, he cannot redeem any of his land that falls within any of the three classes mentioned in sec. 3, art. 13, as, for instance, any land upon which a claimant under a junior patent has paid five years' taxes—the situation of the lands claimed by the defendants. If we assume a case of a tract of 1,000 acres, alleged to be forfeited, which is entirely covered by a larger junior grant coming within the terms of said sec. 3, it is obvious that the claimant could never redeem a foot of it; that the court would not permit the State to file a bill that disclosed that situation; that no ju-
59 dicial enquiry or proceeding concerning it is authorized or permitted, and that any apparent redemption that might be had would be ineffectual. The whole matter would begin and end with the constitutional provisions, and that is the case with any tract to the extent of such adverse claims. To the constitution only must we then look and see if "by operation" thereof it provides that "due process of law" by which only a State may deprive any person of his property. If by that operation it furnishes no such due process, then I hold that sections 3 and 6 of art. 13 of the constitution forfeiting the title of one citizen to his land and transferring that title to another is null and void.

Both in England and America forfeitures and confiscations have always been odious, and it is therefore incumbent upon parties who claim property by virtue of a forfeiture to establish the validity of such forfeiture, consistently with the Federal Constitution, by controlling precedent or by convincing reasoning. Such precedent in support of the claims of the defendants is sought in the Virginia act of February 27th, 1835, already mentioned, and cases arising upon it which departed from the long-established rule of law that an inquest of office or some judicial proceeding or its equivalent—some public transaction subsequent to the commission of the act out of which the forfeiture arose—was necessary to the actual divestiture of the title—the completion of the forfeiture.

There are points of similarity between the act of 1835 and the provisions of the constitution of West Virginia under consideration, but the points of difference are such that that act, itself an anomaly in legislation, cannot stand as a precedent for the constitutional pro-
visions. That act related to lands omitted prior to 1831, not
60 to all lands that were then omitted, nor to lands that had been admitted only since 1831, nor to any lands that might be omitted any time in the future, and only to land in that *terra*

incognita, the region "west of the Alleghany mountains." It was directed at a certain class of persons who had been long delinquent in the past; it did not deal with future delinquencies. It had no operation in the future, beyond the day set when the lands should be entered and the back taxes paid or the penalty of forfeiture incurred. It ceased to have force or effect after that day. It did not need to be repealed to arrest its action; it became *functus officio* by its limitation. The constitution, on the other hand, has reference not to the past but to the future; no particular day is named on which to suffer or avert the forfeiture; it does not cease to operate at a fixed date, but goes on until arrested by repeal. Whatever may be the advantage of one over the other in point of merit or legality, the act of 1835 can be regarded as a precedent only for an exactly similar act.

The cases that have construed the act of 1835, Statts *vs.* Board, 10 Gratt., 400; Wild's Lessee *vs.* Serpell, *id.*, 405; Hale *vs.* Branscum, *id.*, 418; Levassar *vs.* Washburn, 11 Grat., 572, are not applicable as authority in the present case, both because of the difference in the two measures and the conditions that existed when they were enacted, and because I fail to find any reasons assigned to support the conclusions of the court except they were enforcing the terms of the statute under which the proceedings were had. The court was content to declare simply how the act took effect and that the
61 enactment was "within the constitutional competency of the legislature." But it should be noted that the constitution of Virginia did not then contain the prohibition, found probably in the constitution of every other State, against depriving a person of property without due process of law, the provision being "that no man be deprived of liberty except by the law of the land or the judgment of his peers." The legislature of Virginia had prior to the fourteenth amendment a power over property, so far as express restraint was concerned, that no other State, so far as I am advised, has ever had.

The objection that the act of 1835 was unconstitutional as wanting in "due process" has never arisen in Virginia, and it is too late now for such a question to arise, because due process was not required by the constitution of Virginia, and because the fifth amendment to the Constitution of the United States, which provided that no citizen could be deprived of his property without due process of law, was a limitation upon the powers of the Federal Government only (Barron *vs.* Baltimore, 7 Pet., 247) and because the act of 1835 had ceased to have any operation for over thirty years before the fourteenth amendment was adopted; and while that amendment would have annulled the act by reason of its repugnance, if it had been one of continuing operation and had been then in force, it could not reach back over the intervening thirty years to nullify the effect of an act that was not, when it was passed and when it passed out of existence, in conflict with any existing constitution. So when the Supreme Court, in Morrill *vs.* Armstrong, 14 Wall., 109, gave effect to the act of 1835, "as construed by the supreme court or court of appeals of the State," it did not pass upon and had no power to

question the validity of the act for want of due process, and no such question arose.

The proposition that the West Virginia forfeiture is due process of law under the fourteenth amendment because, as it is con-
62 tended, such forfeitures were "the law of the land" in this State and in Virginia when the amendment was adopted, is shown to be unsupported when we consider that at that time West Virginia had never passed a forfeiture act, and that there was none in force in Virginia, either at that time or at the time when West Virginia was made a State, and had not been for many years, and that there never had been any of a general or continuous operation. But whatever may have been the power of any State over the life, liberty, or property of persons, under its own constitution or the rulings of its own courts, prior to the adoption of the fourteenth amendment, it was intended that thenceforth the life, liberty, and property of the citizen should be held "secure from the arbitrary exercise of the powers of government unrestrained by the established principles of private rights and distributive justice." Scott *vs.* McNeal, 154 U. S., 34. It cannot be that that amendment only looked to the prohibition of new wrongs yet to be invented, and left the States free to repeat even those that had called forth that amendment. In White *vs.* Crump & Shanklin, 19 W. Va., 583 (592), it was held that "before the ratification of the fourteenth amendment to the Constitution of the United States the legislature might, if authorized by the State constitution, divest vested rights of property where such rights were not vested by contract; that since the ratifications of said amendment such vested rights of property can only be divested by a State by due process of law."

While the courts have not in general undertaken to give a comprehensive definition of "due process of law," they have, with complete concurrence, declared what is not due process of law in cases of various exertions of asserted power, which is quite as much to our present purpose.

63 It has been held that:

"Due process of law," without which the Constitution declares no person shall be deprived of life, liberty, or property, is not merely an act of the legislature. In Wynehamer *vs.* The People, 13 N. Y., 378, Comstock, J., says: "To say, as has been suggested, that 'the law of the land' or 'due process of law' may mean the very act of the legislature, which deprives the citizen of his rights, privileges, or property, leads to a simple absurdity. The constitution would then mean that no person should be deprived of his property or rights unless the legislature shall pass a law to effect the wrong, and this would be throwing the restraint away." Selden, J., in the same case, says: "To give this clause (of the constitution above referred to) any value, it must be understood to mean that no person shall be deprived by any form of legislative or governmental action of either life, liberty, or property, except as the consequence of some judicial proceedings appropriately and legally conducted. It follows that a law which by its own inherent force extinguishes rights of property or compels their extinction without any legal pro-

ceeding whatever comes directly in conflict with the constitution." Baker *vs.* Kelley, 11 Minn., 480.

"It must be ascertained judicially that he has forfeited his privileges or that some one has a superior title to the land he possesses before either can be taken from him. It cannot be done by mere legislation. If the legislature can take the property of 'A' and transfer it to 'B' they can take 'A' himself and either shut him up in prison or put him to death; but none of these things can be done by mere legislation. There must be due process of law." Taylor *vs.* Porter, 4 Hill (N. Y.), 145, per Judge Bronson.

"By 'the law of the land' is meant not that arbitrary edict of any body of men—not an act of the assembly, though it may have all the outward form of the law—but due process of law, by
64 which either what one alleges to be his is adjudged not to be his or is forfeited upon conviction by his peers of some crime for which it was by law subject to forfeiture when the crime was committed. If this be not so, every restriction upon legislative authority would be a vain formula, without life or force. If an act of assembly can deprive a man of his property without trial and judgment, for even legal cause of forfeiture, it may in like manner deprive him of his life or his liberty, imprison him in a dungeon or hang him without judge or jury." Palairet's Appeal, 67 Pa., 479, per Judge Sharswood.

"Forfeiture of rights and property cannot be adjudged by legislative act, and confiscation without a judicial hearing, after due notice, would be void as not being process of law." Calhoun *vs.* Fletcher, 63 Ala., 574, quoting Cooley's Const. Lims.

"An act of the legislature is not the due process of law mentioned in the Constitution. The words, as remarked by Judge Bronson in the case last cited (Taylor *vs.* Porter), cannot mean less than a prosecution or suit, instituted and conducted according to the prescribed forms of ascertaining guilt or determining the title to property—in other words, a man cannot be legislated out of life, liberty, or property." People *vs.* Toynbee, 20 Barb., 219.

These authorities and a multitude of others to the same effect from all parts of the country are conclusive of the objection to the provisions of the State constitution under consideration. Taken together those provisions do not contemplate nor permit the intervention or aid of any judicial or other proceedings, but purport by their own operation to effect the divestiture and transfer of title. This is not due process of law. As was said by the supreme court of Virginia (Martin *vs.* Snowden, 18 Gratt., 100) of a less objectionable act,
65 "literally speaking, it is not any process at all."

It is not important at this time to enquire what is or what is not due process in proceedings for the assessment and sale of land for taxes. Due process in such cases relates to the regularity of the assessment, the levy, the notices of delinquency or proposed sale, to the sale and the report of sale, etc. It can have no application where, as in the case at bar, there is nothing to which it can apply—where the whole scheme, process, and operation of taxation is wanting and the object savors of land robbery. If the land in this case had been

taxed and sold the question of assessment, sale, and deprivation without the due process applicable to such proceedings might have arisen, but the question of forfeiture never could arise. It is not a matter of taxation. The constitution doesn't ever put it under the head of "taxation," but under the head of "land titles."

The constitution undertakes to forfeit tracts of 1,000 acres and more and not tracts of less than 1,000 acres, and it is urged that for want of just ground of such discrimination it is repugnant to the equality clause of the fourteenth amendment.

In King *vs.* Mullins the Supreme Court held that the discrimination was reasonable because of the difference in the facilities for ascertaining the extent and boundaries of large and of small tracts for purposes of assessment and taxation. The court was probably not aware that under the method of assessing lands in West Virginia, unlike that followed in most of the States, lands are not described on the land books by their boundaries, but only by the number of acres stated in the deed or grant and by the general locality. Since that decision the supreme court of appeals of West Virginia in State *vs.* Swann, 46 West Va., 128, a case in which it was urged that an act of the legislature passed subsequently to the constitution, forfeiting tracts of land less than 1,000 acres, was
66 within an implied prohibition of sec. 6, art. 13, of said constitution, said, per Judge English:

"I think not, and see no good reason why a man owning 990 acres of land who neglects to have it entered upon the land books should be protected from forfeiture when one holding 1,005 is not."

This ruling of the State court is conclusive that there is no good ground for the classification and discrimination made by the State constitution which thus comes under the prohibition of the equality clause of the amendment.

But the court asks: "What is to prevent the constitutional provision and the act from standing together?" The answer is obvious. The constitution being adopted before the act was passed, and being then in contravention of the equality clause of the fourteenth amendment, it was void and inoperative and could not stand by itself till it had the statute to stand with, even if they could have stood together if adopted contemporaneously; and the provision of the constitution being void and dead, it could not be revived or validated by subsequent action of the legislature.

But whatever aid the constitutional provision could get from a statute while in force forfeiting what the constitution spared, it can get none now, because the act of 1882, which by implication repealed the act of April 9th, 1873, forfeiting lands for non-assessment for five years "after" its passage, provides for forfeiture of tracts less than 1,000 acres for non-assessment only for five successive years "since" the 9th day of April, 1873, which expression by its terms covers the period of time from April 9th, 1873, the date of the passage of the act of 1873, to the time of the passage of the act of 1882, and no more, so that there is now and has been since 1882 no law
67 attempting to forfeit tracts of less than 1,000 acres for non-assessment either "after" or "since" 1882, and the constitutional provision stands—or rather falls—alone.

But the most serious objection to the provisions in question is that they undertake to take the lawfully acquired property of one private person without his consent and bestow it gratuitously upon another private person for his private use and enjoyment. If these provisions are effectual, the fee-simple title to land which one instant before midnight on the last day of the year 1888 was in John R. Reed, trustee, was, without his act, knowledge, or consent, without hearing, notice, complaint, or proceedings of any kind, at one instant past midnight transferred from him and vested in Joseph Hatfield, without his knowledge or request and without any action of any other human being, but by the mere effluxion of time and the operation of the pre-existing legislative act—the constitution. One instant Hatfield owned nothing, the next he had title to 780 acres of Reed's land. Reed owed Hatfield nothing, was under no legal, moral, or other obligation to him, had done him no harm, and derived and expected no advantage in any way from him. Hatfield had asked nothing and had no right to ask or expect anything from Reed. Neither probably was aware of the existence of the other. As between them and the State, Hatfield and his predecessors had paid the State taxes on 780 acres for 28 years at the utmost. Reed's predecessors had paid the State taxes on 875,000 acres for 18 years and on 500,000 acres for more than half a century, aside from taxes remitted in 1838. No compensation was exacted from Hatfield either for Reed or for the State. No obligation or duty towards either was put upon him by reason of this donation. All things remained as they were before, except that the State had taken
68 Reed's title to certain land out of him and put it into Hatfield. It requires neither authority nor argument to show that such a transfer cannot be a valid exercise of governmental power. The very sense of justice revolts at it. Free government could not exist where such a power existed. The courts with one voice have denied the existence of such power wherever it has been asserted.

The Supreme Court, in Holden *vs.* Hardy, 169 U. S., 366–390, says:

"Recognizing the difficulty of defining with exactness the phrase 'due process of law,' it is certain that these words imply a conformity with natural and inherent principles of justice and forbid that one man's property or right to property shall be taken for the benefit of another or for the benefit of the State without compensation."

It was said in Bloodgood *vs.* M. & H. R. R. Co., 18 Wend., 56: "It has never been allowed to be a rightful attribute of sovereignty in any government professing to be founded upon fixed laws, however firm the government might be, to take the property of one individual or subject and bestow it upon another. The exercise of such a power would be incompatible with all government and would subvert the foundation principles upon which the government was organized."

The Supreme Court, in Davidson *v.* New Orleans, 96 U. S., 102, says: "It seems to us that a statute which declares in terms, and without more, that the full and complete title to a described piece

of land which is now in A shall be, and is hereby, vested in B would, if effectual, deprive A of his property without due process of law within the meaning of the constitutional provision." And the same court, in Chicago, Burlington & Quincy Railroad *v.* Chicago, 166 U. S., 266, referring to this language, says: "Such an
69 enactment would not receive judicial sanction in any country having a written constitution distributing the powers of government among three co-ordinate departments and committing to the judiciary, expressly or by implication, authority to enforce the provisions of such constitution. It would be treated, not as an exertion of legislative power, but as a sentence, an act of spoliation."

In Wilkinson *v.* Leeland, 2 Pet., 657, the court, speaking by Mr. Justice Story, said: "We know of no case in which a legislative act to transfer the property of A to B without his consent has ever been held a constitutional exercise of power in any State in the Union. On the contrary, it has constantly been resisted as inconsistent with first principles by every judicial tribunal in which it has been attempted to be enforced."

In Loan Association *v.* Topeka, 20 Wall., 664, it is declared: "To lay with one hand the power of the Government on the property of the citizens and with the other to bestow it upon favored individuals is none the less robbery because done under the forms of law and called taxation. This is not legislation. It is a decree under legislative forms. Nor is it taxation."

The supreme court of West Virginia, in Varner *v.* Martin 21 W. Va., 534 (548), Judge Green, on behalf of the court, says:

"It is true that there is neither in our constitution nor in the constitution of other States any express provision forbidding that private property should be taken for the private use of another or any constitutional provision forbidding the legislature to pass laws whereby the private property of one citizen may be taken and transferred to another for his private use without the consent of the owner. It was, doubtless, regarded as unnecessary to insert such a provision in
the constitution or bill of rights, as the exercise of such an
70 arbitrary power *power* of transferring by legislation the property of one person to another without his consent was contrary to the fundemental principles of every republican government, and in a republican government neither the legislative, executive, nor judicial department can possess unlimited power. Such power as that of taking the private property of one and transferring it to another for his own use is not in its nature legislative, and it is only legislative power which, by the constitution, is conferred on the legislature. Such an act, if passed by the legislature, would not in its nature be a law, but would really be an act of robbery—the exercise of an arbitrary power not conferred on the legislature.

There is an entire concurrence of all the authorities in the proposition that private property cannot be taken for private use, either with or without compensation."

It has been suggested that in the present case the property transferred by a legislative act to a private person is not the property of another private person, but of the State, and that the State can do

with its property as it sees fit; that for the mere point of time without duration, where one day joined another, the title of Reed became the property of the State before it passed into Hatfield, so that the State gave its own land, not the land of another. I cannot give my assent to that proposition, for the reason that the transfer to the State would be only by "mere legislative act," not for any public purpose, but for the purpose of the gratuitous transfer to another private person for his own private uses, and without the right of redemption. It would be a taking from one person and giving to another by the State, even though it became the property of the
71 State for an instant of time. No such evasion of the Federal Constitution could be tolerated, but it appears that the title does not vest in the State at all, for by said sec. 3, if effectual, it has previously been transferred to the junior claimant. The language of the constitution is, "All title to lands in this State * * * hereafter forfeited * * * shall be and is hereby transferred to and vested in any person," etc., so that when the title becomes forfeited it is to vest not in the State, but directly in "any person," etc., if such there be, constituting the legislative transfer of A's property to B without A's consent, which the supreme court has repeatedly said never has received, and never can receive, judicial sanction under a constitutional government.

My attention has been called to sundry cases thought to militate against the views here expressed. It is unnecessary to analyze them. They arose upon wholly different states of facts from the case at bar, and properly understood are found to have no application to the present case nor to have the effect supposed. I have found no well-considered decision, nor is it hazarding too much to predict that none will ever be found, to sustain the position that there is any legal power in the Government, State, or National, to transfer by mere legislation the property of one private person without his consent to another private person for his private use for any cause whatever, or that a legislative act can become "due process of law" by the mere fact of its adoption, which are the important questions in this case.

My opinion and conclusion is that the aforesaid provisions of the constitution of West Virginia and the statutes of that State, so far as they purport or undertake to forfeit and divest the title of any person to his land and vest the same in any other private person,
72 or to vest the same in the State without provision for redemption by or on behalf of such owner of the whole or such part of said land as he may desire to redeem, or without provision for a sale thereof and the return of the proceeds to such owner, after deduction of all taxes and proper charges therefrom, are attempts by said State to deprive a person of his property without due process of law, and are prohibited by the Constitution of the United States, and that there can be no valid forfeiture where such right of redemption or receipt or proceeds is prohibited or not provided for.

It does not appear that the defendants have paid all taxes "since the sale" upon the tracts claimed by them under the commissioner of school lands, so as to bring them within sec. 6 of the school-land

act of 1893, requiring the State's bill to be dismissed as to such lands. They are therefore not withdrawn from the provision for redemption nor from the operation of complainant's decree; but if they were withdrawn, then, for the reasons above stated, there could be no valid forfeiture of complainant's title thereto, and it would still be in him. The title to the land in controversy appears from the bill to be in the complai-ant, and he appears to be entitled to the relief prayed for. The demurrer will be overruled, with leave to the defendants to answer.

J. J. JACKSON, *Judge.*

73 *Defendants' Waiver of Answer.*

(Filed —— —, 1900.)

HENRY C. KING
vs.
S. D. HATFIELD ET AL. } In Chancery.

Now come the defendants in this cause, by their counsel, and waive time to answer plaintiff's bill of complaint, as permitted by the order herein overruling these defendants' demurrer to said bill, and decline to make other answer unto said bill, and elect to stand upon their said demurrer.

S. D. HATFIELD,
NANCY C. RUTHERFORD,
By HENRY C. FLESHER,
Their Counsel.

74 *Final Decree.*

And at another day, to wit, on the 2nd day of June, 1900, the following decree was made and entered of record, to wit:

HENRY C. KING
vs.
S. D. HATFIELD ET AL. } In Chancery.

This day came again the parties in open court, by their respective counsel, and the defendants, by written waiver filed herein, declined to make answer to complainant's bill; and thereupon this cause came on to be heard upon complainant's bill, taken for confessed, and upon the exhibits filed therewith and upon said waiver, and was argued by counsel for complainant; whereupon, upon consideration whereof, the court, being of opinion that the patents and deeds hereinafter mentioned cast clouds upon the title of the complainant, and that the complainant is entitled to the relief prayed for, doth order, adjudge, and decree that the instruments dated February 1st, 1859, recorded in the office of the auditor of West Virginia in Grant Book No. 1 of Logan county grants, at pages 460 and 463, purporting to be patents or grants of 450 and 330 acres of land, respectively, from the Commonwealth of Virginia to Aly Hatfield, and the instruments purporting to be deeds from L. D. Chambers,

commissioner of school lands of Logan county, to Joseph Hatfield, bearing date November 10th, 1884, recorded in Deed Book I, at page 464, of the deed records of said county, for 72 acres; August 14th, 1888, recorded in Book K, at page 409, of said deed records, for 48 acres, and March 14th, 1889, in Book N, at page 639, of said deed records, for 140 acres, be, and each of them and the record thereof is, hereby cancelled, annulled, set aside, and held for naught; that the complainant's title and possession be, and it is hereby, quieted against the claims and pretentions of the defendants under
75 said instruments; that the defendants be, and they are hereby, perpetually inhibited and enjoined from asserting title under said instruments against the complainant, and that complainant recover his costs herein.

And at another day the following order was made and entered:

Order Allowing Appeal.

HENRY C. KING
vs.
S. D. HATFIELD and NANCY C. RUTHERFORD. } In Chancery.

This day came the defendants, by their counsel, and presented their petition for an appeal to the Supreme Court from the final decree entered herein on the 2nd day of June, 1900, annulling certain patents and deeds under which the said defendants claim, and from the order made on the 16th day of May, 1900, overruling the demurrer of said defendants to complainant's bill, which petition contains an assignment of errors alleged by said defendants to have been committed by the court in said cause.

And it appearing to the court that this cause is a case involving the construction or application of the Constitution of the United States, and in which it is claimed that the constitution or law of a State is in contravention of the Constitution of the United States, and the said defendants having tendered good and sufficient bond upon said appeal, conditioned according to law—

It is ordered that said petition be filed and said bond approved; that an appeal be, and the same is hereby, allowed as prayed for, and that a transcript of the record and proceedings in said cause be transmitted to said Supreme Court, at Washington, D. C., and that citation to complainant issue herein.

Endorsed:
Entered.

JACKSON, *Judge.*

December 1st, 1900.

76 *Petition for Appeal and Assignment of Errors.*

In the Circuit Court of the United States for the District of West Virginia.

HENRY C. KING
vs.
S. D. HATFIELD and NANCY C. RUTHERFORD.

To the honorable judges of said court:

The defendants in the above-entitled cause feeling themselves aggrieved by a final decree rendered and entered against them herein on the 2nd day of June, 1900, cancelling and setting aside certain patents and deeds under which they claim, and prohibiting defendants from asserting title thereunder, as also by the order entered herein on the 16th day of May, 1900, overruling their demurrer to the complainant's bill of complaint, humbly petition and show unto your honors:

That the said decree and order are erroneous and against the just rights of your petitioners, the said defendants, and that this honorable court erred therein, to the prejudice of your petitioners, in the respects specified in your petitioners' following

Assignment of Errors.

First. The court erred in overruling these defendants' demurrer to the complainant's bill, because it appears from said bill that the tract of land claimed by complainant had, without legal justification or excuse, been omitted from the land books of the counties where the same was situated and had not been charged thereon with State taxes for five successive years preceeding the expiration
77 of the last day of December, 1888, and by consequence thereof the title to said land was by the force and operation of the constitution of West Virginia forfeited and divested out of complainant's grantor and transferred to and vested in Joseph Hatfield, under whom these defendants claim, to the extent of 330 acres and 450 acres then claimed by said Joseph Hatfield and mentioned in said patents, and the title so forfeited and transferred to and vested in said Joseph —— descended to and is now vested in these defendants, and was not restored to complainant by his alleged redemption, not being subject to redemption, and was not in any manner affected thereby or by the proceedings in which the same was had. The other lands claimed by these defendants having been "sold by the State in a proceeding for the sale of school lands," to wit, in a sale of same as waste and unappropriated land, they likewise were not within the operation of complainant's redemption.

Second. The court erred in construing the provisions of said State constitution, viz., secs. 3 and 6 of article XIII, relied upon by these defendants to be in contravention of the Constitution of the United States and to be void and inoperative, and in decreeing the

annulment of the said patents and deeds under which defendants claim, and sustaining complainant's title to the lands therein described, and holding that the title thereof is not vested in these defendants, and enjoining these defendants from asserting title thereto against the complainant.

And your petitioners further show:

That this cause is a case that involves the construction or application of the Constitution of the United States, and is a case in which the constitution or law of a State, to wit, the constitution or law of West Virginia, is claimed to be in contravention of the Constitution of the United States.

78 Wherefore your petitioners pray that an appeal to the Supreme Court of the United States be allowed and granted unto your petitioners; that a transcript of the record of said cause and proceedings be transmitted to said Supreme Court, at Washington, D. C., and that the said decree of June 2nd, 1900, and also the decree of May 16th, 1900, be by said Supreme Court reviewed and reversed.

And your petitioners herewith tender good and sufficient bond upon this appeal.

And your petitioners will ever pray, etc.

S. D. HATFIELD,
NANCY C. RUTHERFORD,
By Counsel.

HENRY C. FLESHER,
Solicitor and Counsel for Petitioners.

Appeal Bond.

Know all men by these presents that we, W. G. W. Iaeger, of the State of New York, as principal, and W. S. Hanna, of West Virginia, as surety, are held and firmly bound unto Henry C. King, of the city of New York, in the full and just sum of three hundred dollars, to be paid to the said Henry C. King, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 1st day of December, in the year of our Lord one thousand and nine hundred.

Whereas lately, at a circuit court of the United States for the district of West Virginia, at Charleston, in said district, in a suit depending in said court between Henry C. King against S. D.

79 Hatfield and others, a decree was rendered against the said S. D. Hatfield and Nancy C. Rutherford, and the said S. D. Hatfield and Nancy C. Rutherford having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said Henry C. King, citing and admonishing him to be and appear at a United States Supreme Court, to be holden at Washington, D. C., on the 31st day of December, 1900:

Now, the condition of the above obligation is such that if the said

S. D. Hatfield and Nancy C. Rutherford shall prosecute said appeal to effect and answer all costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

WM. G. W. IAEGER. [SEAL.]
W. S. HANNA. [SEAL.]

Sealed and delivered in presence of—
Witness:
C. L. DIXON.

Approved by—
J. J. JACKSON,
U. S. D. Judge, D. W. Va.

Dec. 1st, 1900.

80 *Stipulation Concerning Transcript.*

HENRY C. KING
vs.
S. D. HATFIELD ET AL. } In Chancery.

It is agreed by the undersigned, counsel for the respective parties, that there may be omitted from the transcript of the record of this cause upon appeal to the Supreme Court the exhibits mentioned in plaintiff's bill, except the grant to Morris and the decrees marked "Wyoming, 1883," and "Wyoming, 1897," and there may be omitted from the latter decree and from the bill the description by metes and bounds of the said Morris grant, it being agreed that said exhibits show a regular chain of conveyance from said Morris to plaintiff, and the description of said land not being material to any question involved in said cause upon said appeal.

MAYNARD F. STILES,
Counsel for Plaintiff & Appellee.
HENRY C. FLESHER,
Counsel for Defendants & Appellants.

81 United States of America to Henry C. King, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the 31st day of December, 1900, pursuant to an appeal from a decree of the circuit court of the United States for the district of West Virginia in your favor passed in a certain cause in said court wherein you are complainant and S. D. Hatfield and Nancy C. Rutherford are defendants, to show cause, if any there be, why the decree rendered against the said defendants in said cause mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 1st day of December, one thousand nine hundred.

J. J. JACKSON,
United States District Judge, District of West Virginia.

CHARLESTON, W. VA., *Dec.* 11, 1900.

Service of the above citation is hereby accepted on behalf of the appellee King.

MAYNARD F. STILES, *Counsel.*

82 *Clerk's Certificate.*

UNITED STATES OF AMERICA, } ss:
District of West Virginia, }

I, L. B. Dellicker, clerk of the circuit court of the United States for the district of West Virginia, do hereby certify that the foregoing is a true and complete transcript of so much of the record in the chancery case of Henry C. King *vs.* S. D. Hatfield and Nancy C. Rutherford, now of record and on file in my office, as I have been required by the stipulation of counsel filed herein to make.

In testimony whereof I have hereunto set my hand and the seal of said court this 31st day of December, 1900, and in the 124th year of the Independence of the United States of America.

{ Seal Circuit Court United States, District West Virginia, Parkersburg, West Va. }

L. B. DELLICKER,
Clerk Circuit Court U. S., D. W. Va.

Endorsed on cover: File No., 18,011. West Virginia C. C. U. S. Term No., 526. S. D. Hatfield and Nancy C. Rutherford, appellants, *vs.* Henry C. King. Filed January 3, 1901.